

(16,798.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 244.

THE LOUISVILLE AND NASHVILLE RAILROAD
COMPANY ET AL., APPELLANTS,

vs.

HENRY W. BEHLMER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

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a UNITED STATES OF AMERICA, ss:

At a United States circuit court of appeals for the fourth circuit, begun and held at the court-house, in the city of Richmond, on the first Tuesday of November, being the second day of the same month, in the year of our Lord one thousand eight hundred and ninety-seven—present, Hon. Nathan Goff, circuit judge; Hon. Charles H. Simonton, circuit judge; Hon. William H. Brawley, district judge—among other were the following proceedings, to wit:

HENRY W. BEHLMER, Appellant,	} No. 173.
vs.	
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and Other Railroads, Appellees.	

Appeal from the circuit court of the United States for the district of South Carolina, Charleston.

Be it remembered that heretofore, to wit, on the 20th day of April, 1896, transcript of the record in the above-entitled cause was transmitted to and filed in our said circuit court of appeals here, which is as follows, to wit:

b *Transcript of Record.*

THE UNITED STATES OF AMERICA, {
District of South Carolina.

In the Circuit Court. In Equity.

HENRY W. BEHLMER, Plaintiff, Appellant,	}
vs.	
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL., Appellees.	

At a circuit court of the United States for the fourth circuit, in and for the district of South Carolina, begun and holden at Columbia, in the district aforesaid, on the fourth Monday in November, 1894, and at various terms subsequent thereto, before the Honorable Charles H. Simonton, one of the judges of said court for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such cases made and provided, the following proceedings were had in equity:

Be it remembered, that heretofore, to wit: on the 2nd day of November, 1894, H. W. Behlmer, complainant, impleaded The Louisville and Nashville Railroad Company *et al.*, defendants, in a bill of complaint, which bill is in the words and tenor following:

1 THE UNITED STATES OF AMERICA:

In the Circuit Court, Fourth Circuit, Eastern District of South Carolina.

H. W. BEHLMER, Plaintiff,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY and THE Central Railroad and Banking Company of Georgia and H. M. Comer, Its Receiver, as Lessees of the Georgia Railroad; The Memphis and Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as Receivers of said Last Two Mentioned Roads, and The Southern Railway Company, the Purchaser, Assignee, and Successor of said East Tennessee, Virginia and Georgia Railway Company, and The South Carolina Railway Company and Its Receiver, Daniel H. Chamberlain, and The South Carolina and Georgia Railroad Company, the Purchaser, Assignee, and Successor of the Same.

To the circuit court of the United States, sitting in equity within and for the eastern district of South Carolina:

1. Your petitioner, H. W. Behlmer, a citizen and resident of the town of Summerville, South Carolina, humbly complaining, sheweth to this honorable court that the Louisville and Nashville Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Kentucky, having its principal office at Louisville, in the State of Kentucky; that the Central Railroad and Banking Company of Georgia is a corporation created, chartered and existing under and by virtue of the laws of the State of Georgia, having its principal office in the city of Savannah, Georgia, and H. M. Comer has been duly appointed by a competent court as receiver of said last-mentioned company, and is now and has for more than six months last past been its receiver, and as your petitioner is informed and believes, R. Somers Hayes has lately been associated as co-receiver of the said The Central Railroad and Banking Company of Georgia; that the Georgia Railroad Company is operated in the State of Georgia under the name of the "Georgia Railroad Company," with its principal office at Augusta, in the State of Georgia; and the above-named The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, are the lessees of the said The Georgia Railroad Company; that the East Tennessee, Virginia and Georgia Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Tennessee, having its principal office at Knoxville, in the said State of Tennessee, and that Samuel Spencer, Charles M. McGhee and Henry Fink were duly appointed the receivers of the said East Tennessee, Virginia and Georgia Railway Company; and that the Southern Railway Company, a corporation created, chartered, and existing under and by virtue of the laws of the State of —, having its prin-

principal office at Washington, the District of Columbia, now, as your petitioner is informed and believes, owns, controls and operates the railways formerly operated by the said East Tennessee, Virginia and Georgia Railway Company; that the Memphis and Charleston Railroad Company is a corporation created, chartered, and existing under and by virtue of the laws of —, and that Samuel Spencer, Henry Fink and Charles M. McGhee, of the city and State of New York, are now and for more than six months last past have been the receivers of said corporation, controlling and operating the same; that the South Carolina Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of South Carolina, having its principal office at Charleston, in the State of South Carolina, and that D. H. Chamberlain is now and for more than six months last past has been the receiver of the said The South Carolina Railway Company, and that, as your petitioner is informed and believes, the South Carolina and Georgia Railroad Company, a corporation created, chartered, and existing under and by virtue of the laws of South Carolina, does now own, control and operate the railways formerly operated by the said The South Carolina Railway Company; and that each of the said above-described corporations and persons, defendants herein, was on the — day of December, 1892, or has since become, a common carrier, engaged in the transportation of passengers and property wholly by railroad, by itself, or together with some one or more or all of the said other above-named defendants, between points in different States of the United States, and particularly from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, and as such common carriers, so engaged in transportation as aforesaid, the said corporations and persons, defendants herein, were at the time aforesaid, have been since, and now are subject to the provisions of an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, as amended by acts approved March 2, 1889, and February 10, 1891, and supplemented by an act approved February 11, 1893.

2. That each of the said above-described corporations and persons, defendants herein, and were heretofore, to wit: on the — day of December, 1892, duly impleaded with other common carriers, in a controversy, not requiring a trial by jury, as provided for in the seventh amendment to the Constitution of the United States, before the Interstate Commerce Commission, upon the petition of H. W. Behlmer, for alleged violations on the part of the said defendants, of the provisions of the said "act to regulate commerce," as more fully and at large appears in and by the said petition on file in the office of the said commission, and by a true copy thereof hereunto annexed and made a part of this petition, the same being marked Exhibit A.

3 3. That thereafterwards and forthwith copies of the said above-described petition were duly served upon the defendants named therein with full and timely notice to satisfy the same or make answer thereto.

4. That thereafterwards answers to the said petition of H. W. Behl-

mer were filed with the said commission by defendants named in said petition, to wit: by the Louisville and Nashville Railroad Company, and the Central Railroad and Banking Company, and Charles M. McGhee and Henry Fink, receivers of the Memphis and Charleston Railroad Company, and the East Tennessee, Virginia and Georgia Railway Company, and by Daniel H. Chamberlain, receiver of the South Carolina Railway Company, as more fully and at large appears in and by the said answers, on file in the office of the said commission and by true copies thereof hereunto annexed in consecutive order, as above set forth, and hereby made a part of this petition, the same being marked Exhibit B.

5. That thereafterwards, the said causes being at issue upon the pleadings as aforesaid, were duly and regularly brought on for hearing and investigation before the said Interstate Commerce Commission, duly and legally assembled for that purpose, at the city of Charleston, in the State of South Carolina, on the 4th day of April, 1893, when the said H. W. Behlmer, as well as the said defendants, duly appeared, by their officers and attorneys.

6. That during the said hearing and investigation it was made to appear to the satisfaction of the said commission that the said defendants had violated the provisions of the said "act to regulate commerce," in certain respects, as was stated to have been violated by them in the said petitions of Behlmer hereinabove described and made a part hereof; and thereupon, on the 27th day of June, 1894, the said commission duly and legally determined the matters and things drawn in controversy and at issue between the said parties, and made a full report in writing of its findings of fact in respect of such matters and things in controversy and at issue in said causes, and of its conclusions based upon such findings of fact, as will more fully and at large appear in and by the said report of findings and conclusions in said causes on file and of record in the office of the said commission, and by a true copy thereof hereunto annexed and made a part of this petition, the same being marked Exhibit C.

7. That thereafterwards and forthwith upon the determination of the said causes as aforesaid, the said commission duly made and entered a lawful order and notice, based upon the said findings of fact and conclusions of the commission, as set forth in its said report hereinbefore referred to and made a part hereof, agreeably to the provisions of the statute in such cases made and provided, as will more fully and at large appear in and by said order and notice now on file and of record in the office of the said commission, and a true copy thereof hereunto annexed and made a part of this petition, the same being marked Exhibit D.

8. That thereafterwards the said commission did, as required by law, cause a properly authenticated copy of its said report of findings of fact and conclusions in said causes, together with a copy of the order and notice aforesaid to be delivered to each and all of the parties to said cause, their receivers and successors in operation; and that notwithstanding the said commission has established and promulgated rules of practice in cases and proceed-

ings before it, whereby, as set forth in rule XV thereof, suitable provision is made for the showing of error or of newly discovered material evidence by parties against whom an adverse report and order has been made by the commission, and the granting of rehearing upon such showing, if sufficient, none of the defendants in said cause, their receivers or their successors in operation, has filed or presented to said commission an application or petition for the rehearing of said cause, nor has any of said defendants, their receivers or successors in operation, moved in any form or taken any steps whatsoever to vacate, set aside, alter, modify, or change said findings of fact or conclusions or said order and notice, and neither the said findings, conclusions, or order and notice, nor any part thereof, have been vacated, set aside, altered, modified, or changed in any respect whatsoever.

9. That thereupon your petitioner, H. W. Behlmer, shows that after the aforesaid date, when said report and findings of fact and conclusions of the said commission *was* filed, and its order was made and entered as aforesaid, and on and prior and after the days that the said report and said order and notice were caused to be delivered to the parties to said cause, the said defendants in said cause, their receivers or their successors, did have, publish, keep in effect, and charge certain rates for the transportation of the kinds or classes of freight mentioned in said report and order between the points mentioned and referred to in said report and order, which charges were and are the same complained of in said cause, to wit: 28 cents per hundred on hay from Memphis to Summerville, over the roads of defendants herein, who are common carriers, under a common control, management or arrangement, for continuous carriage or shipment, and are engaged in the transportation of passengers and property, wholly by railroad, between points in the States of Tennessee and South Carolina, over the same line in the same direction, and under substantially similar circumstances, the charges for the shorter haul being greater than that for the longer, although the shorter distance was and is included in the longer distance.

10. That the charge maintained from Memphis to Charleston is 19 cents per hundred on hay, while that to Summerville is 28 cents per hundred, the same being made up of the through rate of 19 cents to Charleston, plus 9 cents local to Summerville, the aggregate being unreasonable and oppressive.

11. That the defendants herein have established and now maintain the said rates which they were by said order and notice of the commission duly notified and required to wholly cease and desist on or before the 15th day of July, 1894, and thenceforth abstain from charging, demanding, collecting or receiving; whereby the defendants herein, and each of them, did willfully violate, 5 disobey, disregard, and wholly neglect and refuse to comply with the provisions and requirements of the said order of the commission, and said defendants have continued, and do still continue, to willfully violate, disobey, disregard, and wholly neglect and refuse to comply with the provisions of said order, and each

and every requirement thereof, at Summerville, in the State of South Carolina, and at many other points on the several lines or roads operated by said defendants herein.

Wherefore the petitioner prays :

1. That upon the statements hereinbefore embodied and set forth an order be entered granting to the petitioner a writ of injunction or other proper process, to run during the pendency of this cause, restraining defendants herein, their officers, servants and attorneys from continuing in their violations of and disobedience to said order of the commission.

2. That each of the defendants herein, be given such short notice of this proceeding, and to severally appear herein, as the court shall deem reasonable; that such notice be issued and served upon them, their officers, agents, or servants, in such manner as the court shall direct, and that the court will, at a time and place to be stated in said notice, proceed to hear and determine this matter as a court of equity, verification of any answers that may be filed herein by said defendants, or any of them, being hereby specially waived; and that the court will so order that the formal pleadings and proceedings applicable to ordinary suits in equity shall be dispensed with, and that the findings of fact set forth in the said report of the commission shall in all respects be *prima facie* evidence of the matters therein stated, and so order that this matter shall proceed to speedy hearing and determination.

3. That upon such determination an order, decree, writ of injunction, or other proper process may be issued, restraining the said defendants, and each of them, and their officers, servants, and attorneys, from further violating or disobeying the requirements of said order of the commission, and enjoining perpetual obedience to the same; and further requiring each of the said defendants to pay into court, or in such other manner as the court may direct, such sum of money, not exceeding the sum of five hundred dollars, for every day, after a day to be named therein, that they or any of them shall fail to obey the said order, decree, injunction, or other proper process.

4. That the court order, decree and adjudge the payment by defendants of such costs and counsel fees as may be deemed reasonable.

5. For such other and further relief in the premises as to the court may seem meet and the petitioner's cause may require.

CLAUDIAN B. NORTHOP,

Solicitor for Petitioner.

6

UNITED STATES OF AMERICA, }
State of South Carolina, Eastern District. }

Personally appeared before me, H. W. Behlmer, who on oath says that he is the petitioner in the above cause, and that the allegations contained in the foregoing petition are true to the best of his knowledge and belief.

H. W. BEHLMER.

Sworn to before me this 2d day of November, 1894.

[SEAL.]

C. J. MURPHY,
C. C. C. U. S., District of S. C.

Before the Interstate Commerce Commission.

H. W. BEHLMER

vs.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, THE EAST Tennessee, Virginia and Georgia Railway Company, The Georgia Railroad and Banking Company, The South Carolina Railway Company, Henry Fink and Charles M. McGhee, as Receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company; Daniel H. Chamberlain, as Receiver of the South Carolina Railway Company; The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, as Lessees of the Georgia Railroad, and H. M. Comer, as Receiver of the Central Railroad and Banking Company of Georgia.

Petition.

To the honorable the Interstate Commerce Commission :

The petition of H. W. Behlmer, whose address is Summerville, South Carolina, on behalf of himself and many other merchants and residents of said place, respectfully shows :

First. That Summerville is an incorporated town of considerable size and importance, situate on the South Carolina railway, in the State of South Carolina, and distant 22 miles inland from Charleston, South Carolina.

Second. That your petitioner carries on a wholesale hay and grain business in said town, and is thus 22 miles nearer than Charleston to western points, where grain shipments originate.

Third. That on the 17th day of August, 1892, he received at Summerville, South Carolina, two car-loads of hay, which through his agents, F. D. C. Kracke's Sons, he had ordered from Memphis, Tennessee.

Fourth. That said two car-loads of hay were carried from Memphis, Tennessee, to Chattanooga, Tennessee, 310 miles, by and over the lines of the Memphis and Charleston railroad; from Chattanooga, Tennessee, to Atlanta, Georgia, 152 miles, by and over the lines of the East Tennessee, Virginia and Georgia railroad; from Atlanta, Georgia, to Augusta, Georgia, 171 miles, by and over the lines of the Georgia railroad; and from Augusta, Georgia, to Summerville, South Carolina, 115 miles, by and over the lines of the South Carolina Railway Company. That these defendants are common carriers under a common control, management or arrangement, for continuous carriage or shipment, and are engaged in the transportation of passengers and property wholly by railroad between the points above mentioned.

Fifth. That said two car-loads of hay were hauled from Memphis

Tennessee, to Summerville, South Carolina, over the same line, in the same direction as Charleston, South Carolina, and under substantially similar circumstances and conditions as Charleston traffic. That the haul from Memphis to Summerville was and is 22 miles shorter than the haul from Memphis to Charleston, and the said shorter distance was and is included within the longer distance.

Sixth. That your petitioner was forced to pay 28 cents per hundred pounds on said shipment of hay to Summerville, the shorter distance, whereas the rate to Charleston, the longer distance, was and is 19 cents per hundred pounds.

Seventh. That your petitioner was thus obliged to pay \$56 in the aggregate as freight on these two car-loads of hay from Memphis to Summerville, whereas the same shipment would have been made by the same roads, over the same rails, in the same direction, to Charleston, a greater distance of 22 miles, for a less sum, that is \$38 in the aggregate.

Eighth. That this was and is in violation of the fourth section of the act of Congress, passed February 4th, 1887, entitled An act to regulate commerce, which provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of the like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance."

Ninth. For a further complaint, your petitioner alleges, that he is informed and believes, that the additional 9 cents per hundred which he is forced to pay, is a so-called local rate from Charleston to Summerville, a distance of 22 miles, whereas the through rate from Memphis to Charleston is 19 cents per hundred, the distance being 771 miles. That said local rate is imposed by the South Carolina Railway Company, or its receiver, who now operates the road, or by the Southern Railway and Steamship Association.

Tenth. Your petitioner alleges that on its face this so-called local rate of 9 cents per hundred for 22 miles, is excessive and unreasonable, and the aggregate charge of 28 cents per hundred from Memphis to Summerville is excessive and unreasonable, and in violation of section 1 of the act of Congress of February 4th, 1887, entitled An act to regulate commerce, which provides:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Eleventh. Your petitioner alleges that all the companies and rail-

roads over which said two car-loads of hay were hauled, are duly incorporated under the laws of the United States and the several States in which they do business, and that each and every one of them is a common corrier, subject to the terms of the act of Congress aforesaid, together with its amendment.

Twelfth. That the South Carolina Railway Company is in the hands of a receiver, to wit: Daniel H. Chamberlain, who was duly appointed as such by a competent court, previous to August 17th, 1892, at which time he was running and managing said railway, and still continues to do so. His address is Charleston, South Carolina, where he resides.

Thirteenth. That the East Tennessee, Virginia and Georgia railroad, including the Memphis and Charleston railroad, is also in the hands of receivers, to wit: Henry Fink and Charles M. McGhee, who have been duly appointed as such by a competent court. Their addresses are Knoxville, Tennessee, where they reside.

Fourteenth. The Georgia railroad is operated under a joint lease to the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia, which last-named company is in the hands of H. M. Comer, its duly appointed receiver.

Fifteenth. That all the above-mentioned lines are members of the Southern Railway and Steamship Association, and that the discrimination and excessive rates against Summerville exist not only on hay, as above set forth, but on all articles of interstate commerce coming to that place, much to the detriment and disadvantage of the town and the business of its merchants.

Wherefore your petitioner, on behalf of himself and many others, prays that a notice issue to said railroads to cease and desist from violations of the law as above set forth, and all similar violations, and for such other and further order as the commission may deem necessary in the premises.

CLAUDIAN B. NORTHPROP,
Attorney for Behlmer and Others,
11 Broad St., Charleston, South Carolina.

9 UNITED STATES OF AMERICA, } ss:
Fourth Circuit, District of South Carolina,

Personally appeared before me, C. J. Murphy, deputy clerk of the circuit court of the United States for the fourth circuit, district of South Carolina, H. W. Behlmer, who, on oath, says that the allegations of the foregoing petition are true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes them to be true.

Sworn to before me this 29th day of December, 1892.

[SEAL.]

C. J. MURPHY,
Deputy C. C. C., U. S. Dist. Court.

*Joint Answer of the Louisville and Nashville Railroad Co. and the
Central Railroad and Banking Co.*

Before the Interstate Commerce Commission.

H. W. BEHLMER

vs.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY ET AL. }

The joint and several answer of the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company.

These respondents say :

1. They are complained of in this complaint as the lessees of the Georgia railroad, which is one of the railroads over which was transported the property to which the complaint refers.

These respondents are jointly the assignees of a lease of said railroad, made by the Georgia Railroad and Banking Company to William M. Wadley, which railroad they operate under the adopted name of the "Georgia Railroad Company;" but there is no such corporation as the "Georgia Railroad Company."

2. Respondents admit that at the time of the committing of the acts complained of in the petition, said Georgia Railroad Company and the defendants, The Memphis and Charleston Railroad Company and The East Tennessee, Virginia and Georgia Railroad Company and The South Carolina Railway Company, were severally engaged in the transportation of persons and property by their said several lines of railroad, from Memphis, in the State of Tennessee, thence through the States of Tennessee, Alabama, Georgia and South Carolina, to Charleston, in said last-named State. They had an agreement or arrangement with said named carriers for the continuous carriage or shipment of through freight from Memphis to Charleston at certain agreed through rates, but they were under no common control or management.

3. Respondents admit that Summerville is a town on the line of the South Carolina railway, and is twenty-two miles inland from

Charleston. Respondents presume that it is true that two car-

10 loads of hay were received by petitioner at Summerville from

Memphis on or about August 17, 1892, and that they were carried over the Memphis and Charleston railroad from Memphis, Tennessee, to Chattanooga, Tennessee, a distance of three hundred and ten miles; over the East Tennessee, Virginia and Georgia railroad from Chattanooga, Tennessee, to Atlanta, Georgia, a distance of one hundred and seventy-one miles; over the South Carolina railway from Augusta to Summerville, a distance of one hundred and fifteen miles. And respondents admit that said railroads are common carriers, and are engaged in the transportation of passengers wholly by railroad between points in the States of Tennessee and South Carolina.

4. Respondents admit the haul from Memphis to Summerville is

twenty-two miles shorter than the haul from Memphis to Charleston, and that said shorter distance is included in the longer distance.

5. Respondents admit that a greater compensation in the aggregate was received for the transportation of said two car-loads of hay from Memphis to Summerville, than would have been charged for the same if they had been transported to Charleston.

6. Respondents deny that the aggregate charge of twenty eight cents per hundred from Memphis to Summerville is excessive and unreasonable and in violation of section IV of the act of Congress of February 4th, 1887, entitled An act to regulate commerce.

7. Respondents deny that the acts complained of in the petition are in violation of the fourth section of the aforesaid act; for the following reasons: to wit:

1. The Georgia Railroad Company and the other carriers complained against have no joint through tariff from Memphis to Summerville, and therefore they have no "line" in the sense of said section from Memphis to Summerville, on which said section can operate.

2. The transportation of two car-loads of hay from Memphis to Summerville is not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston.

For (first) Summerville is a local station on the South Carolina railway. It is not on any water route, and enterprise and capital have not constructed more than one railroad to it. It has not, therefore, the advantage of competition of carriers. The one railroad, on which it is located, viz: the South Carolina Railway Company is not compelled by competition to choose between a reasonable rate and a rate which is much below what would be reasonable. On the other hand, at Charleston there exists competition with numerous all-rail routes between Memphis and Charleston. Respondents here mention eight of these all-rail routes between Memphis and Charleston, to wit:

Memphis and Charleston railroad; East Tennessee, Virginia and Georgia railroad; Savannah, Florida and Western railway, and Charleston and Savannah railway.

Memphis and Charleston; Western and Atlantic; Central Railroad and Banking Company of Georgia; Port Royal and Augusta, and Charleston and Savannah.

Memphis and Charleston; Western and Atlantic, East Tennessee, Virginia and Georgia or Central Railroad and Banking Company of Georgia; Seaboard air line; Clinton, Newberry and Laurens, and the Atlantic coast line.

Kansas City, Memphis and Birmingham; Central Railroad and Banking Company of Georgia; Port Royal and Augusta and Charleston and Savannah.

Kansas City, Memphis and Birmingham; Georgia Pacific; Richmond and Danville, and Atlantic coast line.

Kansas City, Memphis and Birmingham; Louisville and Nashville; Alabama Midland; Savannah, Florida and Western, and Charleston and Savannah.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Georgia railroad, and South Carolina railway.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Seaboard air line, and Atlantic coast line or Port Royal and Western Carolina; Port Royal and Augusta, and Charleston and Savannah railroads.

Besides these eight all-rail routes there are others, which could be designated. These lines are not only potential but are actual competitors with these respondents and their codefendants, for business from Memphis to Charleston.

(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other eastern ports, from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from North Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

(Third.) The rates on western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made a view to actual, existing water competition. Western produce such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia, and Baltimore, over continuous water routes via the lakes and canal, or over combined rail and water routes.

The all-rail lines, seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water route or by the combined rail and water routes. The all-rail routes make their rates as much higher as the difference in service will permit, and those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rate from Chicago to Charleston on hay, for instance, is 33c.

per 100 lbs.; from St. Louis, 28c.; from Louisville, Evansville and Cairo, 23c.; and from Memphis, 19c.—the route through

Memphis offering facilities for the transportation of hay, grain and western products generally, from the States of Missouri, Kansas, Nebraska, etc.

The rate from Memphis to Charleston on hay is, therefore, forced upon the defendant lines by actual existing water competition and other competition beyond the control of defendant.

The controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston.

(Fourth.) As above stated, the Georgia Railroad Company, and the other carriers complained against, have no joint through tariffs

from Memphis to Summerville. They do have joint through tariffs from Memphis to Charleston, and the joint through rate from Memphis to Charleston on hay is 19c. per 100 lbs.

Respondent's information and belief is, that the defendant, The South Carolina Railway Company or its receiver, charges a local rate of 9c. per 100 lbs. on hay between Charleston and Summerville, which added to the 19c. per 100 lbs. from Memphis to Charleston makes the total combined through and local rate Memphis to Summerville 28c. per 100 lbs. on hay.

Respondent's information and belief is, that said local rate of 9c. per 100 lbs., charged by the South Carolina Railway Company or its receiver, between Charleston and Summerville is just and reasonable.

JOS. B. CUMMING,
Respondent's Solicitor.

STATE OF GEORGIA, }
Richmond County. }

You, John W. Green, do swear, that you are the general manager of the Georgia Railroad Company, and that the facts set out in the foregoing answer, so far as they are stated of your own knowledge are true, and so far as they are stated on information and belief you believe them to be true. So help you God.

(Signed)

JNO. W. GREEN.

Sworn to and subscribed before me, this 25th day of March, 1893.

[SEAL.]

WM. LYON MARTIN,
Notary Public, Richmond County, Georgia.

13 *Answer of D. H. Chamberlain, Receiver.*

Before the Interstate Commerce Commission.

H. W. BEHLMER
vs.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY ET AL. }

Answer of D. H. Chamberlain, receiver of the South Carolina Railway Company.

This respondent says:

1. Respondent admits that Summerville is a town on the line of the South Carolina railway, and is twenty-two miles inland from Charleston. Respondent admits that it is true that two car-loads of hay were received by petitioner at Summerville from Memphis, on or about August 17, 1892; and that they were carried over the Memphis and Charleston railroad from Memphis, Tennessee, to Chattanooga, Tennessee, a distance of three hundred and ten miles; over the East Tennessee, Virginia and Georgia railroad from Chattanooga, Tennessee, to Atlanta, Georgia, a distance of one hundred and fifty-two miles; over the Georgia railroad from Atlanta, Georgia, to Augusta, Georgia, a distance of one hundred and seventy-one

miles; over the South Carolina railway from Augusta to Summerville, a distance of one hundred and fifteen miles. And respondent admits that said railroads are common carriers, and are engaged in the transportation of passengers wholly by railroad between points in the States of Tennessee and South Carolina.

2. Respondent admits that the haul from Memphis to Summerville is twenty-two miles shorter than the haul from Memphis to Charleston, and that said shorter distance is included in the longer distance.

3. Respondent admits that a greater compensation in the aggregate was received for the transportation of said two car-loads of hay from Memphis to Summerville than would have been charged for the same if they had been transported to Charleston.

4. Respondent submits that the aggregate charge of twenty-eight cents per hundred from Memphis to Summerville is not excessive, and not unreasonable and not in violation of section 1 of the act of Congress of February 4th, 1887, entitled An act to regulate commerce.

5. Respondent submits that the acts complained of in the petition are not in violation of the fourth section of the aforesaid act, for the following reasons, to wit:

1. The Georgia Railroad Company and the other carriers complained against, have no joint through tariff from Memphis to Summerville, and therefore they have no "line" in the sense of said section from Memphis to Summerville on which said section can operate.

2. The transportation of two car-loads of hay from Memphis to Summerville is not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, for—

(First.) Summerville is a local station on the South Carolina railway. It is not on any water route, and enterprise and capital have not constructed more than one railroad to it. It has not, therefore, the advantage of competition of carriers. The one railroad, on which it is situated, viz: the South Carolina Railway Company is not compelled by competition to choose between a reasonable rate and a rate which is much below what would be reasonable. On the other hand, at Charleston there exists competition with numerous all-rail routes between Memphis and Charleston. Respondents here mention eight of these all-rail routes between Memphis and Charleston, to wit:

Memphis and Charleston railroad; East Tennessee, Virginia and Georgia railroad; Savannah, Florida and Western railway, and Charleston and Savannah railway.

Memphis and Charleston; Western and Atlantic; Central Railroad and Banking Company of Georgia, and Charleston and Savannah.

Memphis and Charleston; Western and Atlantic, East Tennessee, Virginia and Georgia or Central Railroad and Banking Company of Georgia; Seaboard air line; Columbia, Newberry and Laurens, and the Atlantic coast line.

Kansas City, Memphis and Birmingham; Central Railroad and Banking Company of Georgia; Port Royal and Augusta and Charleston and Savannah.

Kansas City, Memphis and Birmingham; Georgia Pacific; Richmond and Danville, and Atlantic coast line.

Kansas City, Memphis and Birmingham; Louisville and Nashville; Alabama Midland; Savannah, Florida and Western, and Charleston and Savannah.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Georgia railroad, and South Carolina railway.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Seaboard air line, and Atlantic coast line or Port Royal and Western Carolina; Port Royal and Augusta, and Charleston and Savannah railroads.

Besides these enumerated all-rail routes there are others, which could be designated. These lines are not only potential but are actual competitors with these respondents and their codefendants, for business from Memphis to Charleston.

(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other eastern ports, from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from North Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

15 (Third.) The rates on western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual, existing water competition. Western produce such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia, or Baltimore, over continuous water routes via the lakes and canal, or over combined rail and water routes.

The all-rail lines, seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates as much higher as the difference in service will permit, and those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rate from Chicago to Charleston on hay, for instance, is 33c. per 100 lbs.; from St. Louis, 28c.; from Louisville, Evansville and Cairo, 23c.; and from Memphis, 19c.—the route through Memphis offering facilities for the transportation of hay, grain and western products generally, from the States of Missouri, Kansas, Nebraska, etc.

The rate from Memphis to Charleston on hay is, therefore, forced upon the defendant lines by actual existing water competition and by other competition beyond the control of the defendant.

The controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston; or the

lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston.

(Fourth.) As above stated, the Georgia Railroad Company, and the other carriers complained against, have no joint through tariffs from Memphis to Summerville. They do have joint through tariffs from Memphis to Charleston, and the joint through rate from Memphis to Charleston on hay is 19c. per 100 lbs.

Respondent admit- that he charges a local rate of 9c. per 100 lbs. on hay between Charleston and Summerville, which added to the 19c. per 100 lbs. from Memphis to Charleston makes the total combined through and local rate Memphis to Summerville 28c. per 100 lbs. of hay.

Respondent submits that said local rate of 9c. per 100 lbs., so charged by the respondent receiver, between Charleston and Summerville is just and reasonable.

(Signed)

BRAWLEY & BARNWELL,

Counsel for Receiver.

STATE OF SOUTH CAROLINA, }
Charleston County. }

Personally appeared before me Daniel H. Chamberlain, who, being duly sworn, says that the matters and things in said answer stated so far as they depend upon his own knowledge are true, and so far as they depend upon the information of others, he believes them to be true.

DANIEL H. CHAMBERLAIN.

16 Sworn to before me this 24th day of March, 1893.

NATH. LEVIN,

[SEAL.]

Notary Public.

Answer of Charles M. McGhee and Henry Fink, Receivers.

H. W. BEHLMER

vs.

MEMPHIS & CHARLESTON RAILROAD COMPANY ET AL. }

Chas. M. McGhee and Henry Fink, receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company, for answer to the complaints in this proceeding respectfully state:

1. As to the truth of the allegations of the first, second and third paragraphs in the petition contained, they are not advised and can neither admit nor deny the same, but demand proof thereof, so far as is material.

2. They admit the statement in the fourth paragraph of said petition except as to the shipment of said two car-loads of hay over the lines mentioned, as to which they are uninformed.

3. They do not admit the allegations of the fifth paragraph of the petition, and especially deny the averment that the haul from

Memphis, Tennessee, to Summerville, S. C., is made under substantially similar circumstances and conditions as Charleston traffic, and they demand proof of all the material averments of said paragraph.

4. They do not admit the averments of the sixth and seventh paragraph- and demand proof of the same.

5. They do not admit either the facts or conclusions therefrom drawn, as contained in the eighth paragraph and demand proof of the same.

6. They do not admit the allegations contained in the ninth paragraph and they demand proof of the same so far as is material.

7. They deny both the statement of facts and the conclusions stated in the tenth paragraph.

8. They admit the statement in the eleventh.

9. They are not advised as to the truth of the statement contained in the twelfth paragraph, and so far as is material demand proof thereof.

10. They admit the statement contained in the thirteenth paragraph except as to the addresses and residences of these defendants which are New York, N. Y., and not Knoxville, Tenn.

11. As to the statements contained in the fourteenth paragraph, they are not fully advised and neither admit nor deny them but, if material, they demand proof of the same.

12. They do not admit the allegations of the fifteenth paragraph of the petition, and they demand full proof of every material averment therein set forth.

17 Therefore, these defendants pray that the complainant in this proceeding be dismissed.

(Signed)

CHAS. M. MCGHEE,
HENRY FINK,

Receivers E. T. V. & G. Ry Co. and M. & C. R'd.

STATE OF TENNESSEE, }
County of Knox. }

Edwin Fitzgerald, being duly sworn, says that he is the traffic manager for Chas. M. McGhee and Henry Fink, receivers of the East Tennessee, Virginia and Georgia Railway Company and Memphis and Charleston Railroad Company, defendants in this proceeding, and that the foregoing answer is true, as he verily believes.

(Signed)

EDWIN FITZGERALD.

Subscribed and sworn to before me this 16th day of February, 1893.

(Signed)

C. H. HURVEY,
U. S. Commissioner.

Report and Opinion of the Commission.

YEOMAMS, Commissioner :

The complainant alleges on behalf of himself and other merchants and residents of Summerville, S. C., that the defendants

charge an unreasonable and excessive rate of 28 cents per 100 lbs. on hay in car-load lots from Memphis to Summerville; that said rate of 28 cents is 9 cents per 100 lbs. greater than the defendants charge and receive for transporting hay in car-loads from Memphis through Summerville to Charleston, S. C., and that such greater charge constitutes a violation of the long and short haul clause of the statute; that said rate of 28 cents to Summerville is equal to the rate of 19 cents in force on hay in car-loads from Memphis through Summerville to Charleston plus the local rate of 9 cents per 100 lbs. charged over the South Carolina railway for carrying hay from Charleston back to Summerville, and that said 9-cent local rate which complainant is forced to pay in addition to the through Charleston rate in order to get hay transported by defendants from Memphis to Summerville is also unreasonable and excessive. The shipment of two car-loads of hay from Memphis to Summerville in August, 1892, upon which complainant was compelled to pay the 28-cent rate is specified in the complaint. The complainant also alleges generally that the defendants engaged in transportation from Memphis to Charleston are subject to the act to regulate commerce; that all of the roads involved in this proceeding are members of the Southern Railway and Steamship Association, and that the discrimination and excessive rates against Summerville exist not only on hay but on all articles of interstate commerce coming to that place to the detriment and disadvantage of the town and the business of its merchants. The complaint prays

18 that defendants be ordered to cease and desist from further violating the law as therein alleged and from all similar violations, and for such other and further order as the commission may deem necessary in the premises.

The joint answer of the receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company admits that they are subject to the act to regulate commerce, and that the shipment of hay took place as specified in the complaint, but they do not admit that the rates set forth in the complaint constitute any violation of the law, and demand proof of the same.

The joint answer of the lessees of the Georgia railroad and the answer of the receiver of the South Carolina Railway Company are substantially the same. These answers, while admitting the rates to be as stated in the complaint, and that the shipment specified in the complaint was made over the defendant roads, deny that said rates are in violation of the act to regulate commerce. In relation to complainant's allegation of violation of the fourth section, these answers contain the following specific averments:

1. The Georgia Railroad Company and the other carriers complained against, have no joint through tariff from Memphis to Summerville, and therefore they have no "line" in the sense of said section from Memphis to Summerville on which said section can operate.

2. The transportation of two car-loads of hay from Memphis to Summerville is not done under substantially similar circumstances

and conditions as the transportation of like property from Memphis to Charleston, for—

(First.) Summerville is a local station on the South Carolina railway. It is not on any water route, and enterprise and capital have not constructed more than one railroad to it. It has not, therefore, the advantage of competition of carriers. The one railroad, on which it is located, viz: the South Carolina Railway Company is not compelled by competition to choose between a reasonable rate and a rate which is much below what would be reasonable. On the other hand, at Charleston there exists competition with numerous all-rail routes between Memphis and Charleston. Respondents here mention eight of these all-rail routes between Memphis and Charleston, to wit:

Memphis and Charleston railroad; East Tennessee, Virginia and Georgia railroad; Savannah, Florida and Western railway, and Charleston and Savannah railway.

Memphis and Charleston; Western and Atlantic; Central Railroad and Banking Company of Georgia, Port Royal and Augusta and Charleston and Savannah.

Memphis and Charleston; Western and Atlantic, East Tennessee, Virginia and Georgia or Central Railroad and Banking Company of Georgia; Seaboard air line; Clinton, Newberry and Laurens, and the Atlantic coast line.

Kansas City, Memphis and Birmingham; Central Railroad and Banking Company of Georgia; Port Royal and Augusta and Charleston and Savannah.

19 Kansas City, Memphis and Birmingham; Georgia Pacific; Richmond and Danville, and Atlantic coast line.

Kansas City, Memphis and Birmingham; Louisville and Nashville; Alabama Midland; Savannah, Florida and Western, and Charleston and Savannah.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Georgia railroad, and South Carolina railway.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Seaboard air line, and Atlantic coast line or Port Royal and Western Carolina; Port Royal and Augusta, and Charleston and Savannah railroads.

Besides these eight enumerated all-rail routes there are others, which could be designated. These lines are not only potential but are actual competitors with these respondents and their codefendants, for business from Memphis to Charleston.

(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other eastern ports, from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from North Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

(Third.) The rates on western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual existing water competition. Western produce such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia, or Baltimore, over continuous water routes via the lakes and canal, or over combined rail and water routes.

The all-rail lines seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water route or by the combined rail and water routes. The all-rail routes make their rates as much higher as the difference in service will permit, and those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rates from Chicago to Charleston on hay, for instance, is 33c. per 100 lbs.; from St. Louis, 28c.; from Louisville, Evansville and Cairo, 23c.; and from Memphis, 19c.—the route through Memphis offering facilities for the transportation of hay, grain and western products generally, from the States of Missouri, Kansas, Nebraska, etc.

The rate from Memphis to Charleston on hay is, therefore, forced upon the defendant lines by actual existing water competition and by other competition beyond the control of the defendant.

The controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston.

(Fourth.) As above stated, the Georgia Railroad Company, and other carriers complained against, have no joint through tariffs from Memphis to Summerville. They do have joint through tariffs from Memphis to Charleston, and the joint through rate from Memphis to Charleston on hay is 19c. per 100 lbs.

If it shall appear in this case that the defendants violate the long and short haul clause of the law by keeping the higher rate to Summerville in force, it will be unnecessary to consider in this report whether the rate to Summerville is in violation of other provisions of the law. In that event the prohibition of the fourth section will afford all the reduction demanded in the complaint.

Facts and Conclusions.

Transportation from Memphis to Charleston via the connecting and continuous line formed by the defendants' railroads passes through Summerville, a point on the South Carolina road 21 miles west of Charleston, which road is also the delivering carrier for traffic over this line to Charleston. Their rate in force for the carriage of hay in full car-loads from Memphis to Summerville, is 28 cents per hundred pounds, and this rate is equal to a combination of the 19-cent rate to Charleston plus a 9-cent local of the South

Carolina road back to Summerville. Shipments from Memphis to either Charleston or Summerville are carried through over this line of connecting roads under through bills of lading.

The defendants make a joint tariff rate on hay to Charleston from Memphis, and unless they show substantial dissimilarity in circumstances and conditions under which the transportation to Charleston and Summerville is conducted, they are prohibited by the fourth section of the law from making any greater charge for the shorter distance to Summerville than that which they have in force for carrying over the same line in the same direction for the longer distance to Charleston.

The defendants claim that substantial dissimilarity in such circumstances and conditions is created by :

1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all-water lines or by all rail or part rail and part water routes.

2. The competition of all-rail lines between Memphis and Charleston.

The construction of the fourth section of the act as laid down in the case of *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*, 3 Inters. Com. Rep., 682; 4 I. C. C. Rep. 744, and in *Ga. R. R. Com. v. Clyde S. S. Co.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324—followed and explained in *Gerke Brew. Co. v. Louisville & N. R. Co.*, 4 Inters. Com. Rep., 267; 5 I. C. C. Rep., 596—and also reaffirmed by the commission in *Chattanooga Board of Trade v. East Tennessee, V. & G. R. Co.*, 4 Inters. Com. Rep. 213; 5 I. C. C. Rep., 546, has been passed upon by the Federal courts in the

proceeding brought by this commission against the Cincinnati, New Orleans and Texas Pacific Railway Company and others to enforce its order in the first above-mentioned case (*James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*) The decision of the United States circuit court for the northern district of Georgia reviewed the construction of the fourth section by the commission, and declared that construction to be altogether unsound. *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.*, 4 Inters. Com. Rep., 332; 56 Fed. Rep., 925. But the commission took an appeal to the circuit court of appeals for the fifth judicial circuit, and that court has recently rendered a decision annulling and reversing the decision of the circuit court, and remanding the case with instruction to enforce the long-and-short-haul order of the commission in that case. *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* circuit court of appeals. (Not yet reported.)

This decision of the circuit court of appeals amounts to an affirmance of the commission's construction of the meaning of the fourth section as laid down in the cases above mentioned, and under that construction the complaint in this case must be sustained. There is no showing in this proceeding of competition by lines not subject to the act to regulate commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be

carried to Charleston by various rail and water or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the commission for relief under the proviso clause of that section, but for reasons stated in our decisions of the cases above cited they do not justify carriers in departing from the rule of the fourth section without such a relieving order. Water competition, to justify lower long-haul rates, must exist between the point of shipment and the longer distance point of destination. *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*, *supra*. One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. *Chattanooga Board of Trade v. East Tennessee, V. & G. R. Co.*, *supra*. The competition of markets or the competition of carrying lines subject to regulation under the act to regulate commerce does not justify carriers in making greater short-haul or lower long-haul charges over the same line without an order issued by the commission on application therefor and after investigation. *Ga. R. R. Com. v. Clyde S. S. Co.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324, and *Gerke Brew. Co. v. Louisville & N. R. Co.*, 4 Inters. Com. Rep., 267; 5 I. C. C. Rep., 596.

The following rule of practice was laid down by us in the Georgia railroad commission cases: "When a carrier on complaint
22 under the fourth section avers substantial dissimilarity in circumstances and conditions as justifying its greater charge for shorter hauls, it is concluded by its pleading and must affirmatively show that the circumstances and conditions of which it is entitled to judge in the first instance are in fact substantially dissimilar; but upon an application for relief under the fourth-section proviso the carrier is not limited by such a rule of evidence, and may present to the commission every material reason for an order in its favor."

Because Charleston is an important seaport and railroad centre, and hay may be and is carried there from various points, is not sufficient reason for a departure from this rule. The just interests of the carriers are fully protected by the proviso clause of the fourth section. The defendants are under no obligation to compete at low rates for the carriage of hay from Memphis to Charleston. They ought not to engage in such competition if the rates obtainable are not remunerative. If they are remunerative the defendant cannot, in the face of the prohibition of the fourth section, and the provision in that section for the issuance of relieving orders, assume to say that such rates though profitable on Charleston traffic are insufficient for the transportation of car load quantities to a shorter distance point on the same line and in the same direction. That is a question which Congress, by enacting the proviso or saving clause in the fourth section, made it the duty of this commission to determine. The very reason why the proviso was added to the

section was to enable carriers to obtain relief from hardship in special cases if, upon application for relief, they make it appear that hardship actually exists.

Neither of the defendants having applied for relief under the proviso to the fourth section, order will be entered directing them to cease and desist, on or before July 15, 1894, from charging or collecting any greater sum in the aggregate for the transportation from Memphis to Summerville of hay, or other commodities carried by them under circumstances and conditions similar to those appearing in this case, than they do for such transportation for the longer distance to Charleston, but without prejudice to the right of said defendants to apply for relief under the fourth section of the act to regulate commerce. The filing of an application for relief by the defendants, or either of them, before the time above specified, will, if it refers to transportation over this line to Charleston, operate as a stay upon this order during the pendency of proceedings on such application.

EXHIBIT D.

Order of the Commission.

At the general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of June, A. D. 1894.

Present: Hon. William R. Morrison, chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. Judson C. Clements, Hon. James D. Yeomans, commissioners.

23

H. W. BEHLMER

vs.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, THE East Tennessee, Virginia and Georgia Railway Company, The Georgia Railway and Banking Company, The South Carolina Railway Company, Henry Fink and Charles M. McGhee, as Receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company; Daniel H. Chamberlain, as Receiver of the South Carolina Railway Company; The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, as Lessees of the Georgia Railroad, and H. M. Comer, as Receiver of the Central Railroad Banking Company of Georgia.

Order of the Commission.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and the commission having on the date hereof, made and filed a report and opinion herein containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order; and the commission having, as appears

by said report and opinion, found and decided that the complaint in this case should be sustained:

It is ordered and adjudged, that the defendants, The Memphis and Charleston Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; The Georgia Railroad and Banking Company; The South Carolina Railway Company; Henry Fink and Charles M. McGhee, as receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company; Daniel H. Chamberlain, as receiver of the South Carolina Railway Company; The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, as lessees of the Georgia railroad; and H. M. Comer, as receiver of the Central Railroad and Banking Company of Georgia, and each of them, do wholly cease and desist on or before the 15th day of July, 1894, and thenceforth abstain, from charging, demanding collecting or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities carried by them under circumstances and conditions similar to those appearing in this case, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than they contemporaneously charge and receive for the transportation of hay and such other commodities, respectively, for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina.

And it — further ordered, that a notice embodying this order be forthwith sent to each of the defendants in this case, together with a copy of the report and opinion of the commission herein, in conformity with the provisions of the fifteenth section of the act to regulate commerce.

24

INTERSTATE COMMERCE COMMISSION,
WASHINGTON, D. C.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled, report and opinion of the commission and order of the commission, are true copies of the originals, now on file, and recorded in the office of this commission.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the commission, this 6th day of July, 1894.

[SEAL.]

EDW. A. MOSELEY, *Secretary*.

Foregoing petition and exhibits filed November 2, 1894.

H. W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL. }

*Order to Show Cause on December 3, 1891, and to Restrain Charges
Complained of Pending These Proceedings.*

These proceedings having been filed under "An act to regulate commerce," approved February 4, 1887, and subsequent amend-

ments thereto, it is, on motion of Claudian B. Northrop, petitioner's solicitor—

Ordered and directed by the court that the defendant corporations in the above-entitled cause, and their several successors and receivers appear before the United States circuit court, at the courtroom in Columbia, South Carolina, on Monday, the third day of December, 1894, or as soon thereafter as counsel can be heard, to answer said proceedings and to show cause why the prayer of the petition should not be granted.

It is further ordered, that pending these proceedings and the hearing thereon, the said The Louisville and Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad, the Memphis and Charleston Railroad Company, the East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia and Georgia Railway Company; and the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and the South Carolina and Georgia Railroad Company, the purchaser, assignee and successor of the same, be and each and every one of them are hereby ordered, commanded, restrained and enjoined from demanding, charging, collecting or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities carried by them under circumstances and conditions similar to those

25 in this case, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than they contemporaneously charge and receive for the transportation of hay and such other commodities respectively, for the longer distance from Memphis to Charleston, in the State of South Carolina.

And that the South Carolina and Georgia Railroad Company be and is hereby particularly ordered, restrained and enjoined from imposing, demanding, charging, collecting or receiving the added local of nine cents in addition to the through rate of nineteen cents to Charleston.

Further ordered, that a copy of this order be served on each of the defendants residing in this State, by serving any of the principal officers of the same in this State, and that the non resident defendants be served by serving a copy of said order on the principal representatives of said corporations who can be found in this State, if there be such, and that in addition thereto said non-resident defendants be notified by sending a copy of this order in a registered letter to the president or chief officer of the same, wherever located.

In open court this 2d day of November, 1894,

CHARLES H. SIMONTON,

Circuit Judge.

I, J. E. Hagood, clerk of said court, do hereby certify that the foregoing is a true copy of the original now on file in my office.

Given under my hand and seal of said court, in the city of Charleston, S. C., this the 2d day of November, A. D. 1894.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., District S. C.

Filed November 2, 1894.

Notice.

In the Circuit Court of the United States for the District of South Carolina.

H. W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE R. R. CO. ET AL. }

Please take notice that in this case the defendants, The Louisville and Nashville Railroad Company, The Central Railroad and Banking Company of Georgia; H. M. Comer, receiver of the railroad of said last-mentioned company; The Memphis and Charleston Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; Samuel Spencer, Henry Fink and Charles M. McGhee, receivers of the railroads of said two last-mentioned companies; The South Carolina Railway Company and Daniel H. Chamberlain, receiver of the railroad of said last-mentioned railway company, having filed their joint and several answer to the petition in this case, respectfully move the court to set aside and annul the restraining order heretofore granted in this case, 26 on the 2d day of November, 1894; said motion to be heard upon said petition and answer and affidavits, on Wednesday, Nov. 21, 1894, at 10 o'clock a. m., at U. S. court-house.

JOS. W. BARNWELL,
W. A. HENDERSON,
JOS. B. CUMMING,
ED. BAXTER,

Of Counsel.

To Claudian B. Northrop, solicitor for petitioner.

Filed November 20, 1894.

Notice.

UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

H. W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL. }

To Claudian B. Northrop, solicitor for petitioner:

Please take notice that on Tuesday next November the 20th, 1894, at 10 o'clock a. m., at the United States court-house in

Charleston, the undersigned will move before said court, or in case the same be not in session, before the Honorable Charles H. Simon-ton, circuit judge, for an order setting aside the temporary injunction granted in above case against the South Carolina and Georgia Railroad Company on the ground that the said court has no jurisdiction under the proceedings in this case to enjoin the defendant, The South Carolina and Georgia Railroad Company, inasmuch as the said company was not a party to the proceeding before the Interstate Commerce Commission in the case of H. W. Behlmer, against the Memphis and Charleston Railroad Company, referred to in the petition, and has therefore, never been served with any legal order or notice by said commission and has therefore, never refused or declined to obey any legal order of said commission. Please take further notice that the undersigned appears in this cause solely for the purpose of making the above objections to the said order of injunction and for the purpose of setting aside the same.

JOS. W. BARNWELL,
Solicitor for S. C. & Ga. R. R.

I accept service of within notice this 16th day of November, 1894.
C. B. NORTHROP,
Per FITZSIMONS.

Filed November 20, 1894.

Joint and Several Answer.

The joint and several answer of the Louisville and Nashville Railroad Company, the Central Railroad and Banking Com-
27 pany of Georgia, H. M. Comer, receiver of the railroad of said last-mentioned company; the Memphis and Charleston Railroad Company, the East Tennessee, Virginia and Georgia Rail-way Company, Samuel Spencer, Henry Fink, and Charles M. McGhee, receivers of the railroads of said two last-mentioned companies; the South Carolina Railway Company, and Daniel H. Chamberlain, receiver of the railroad of said last-mentioned company, to the petition filed by H. W. Behlmer against these respondents and others in the circuit court of the United States for the district of South Carolina, in equity.

These defendants, respectively, now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had, or taken, to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, say :

1. Respondents admit that H. W. Behlmer, the petitioner in this case, is a citizen and resident of the town of Summerville, in the State of South Carolina; that respondent, The Louisville and Nashville Railroad Company, is a corporation created, chartered, and

existing under and by virtue of the laws of the State of Kentucky, having its principal office at Louisville, in the State of Kentucky; that respondent, The Central Railroad and Banking Company of Georgia, is a corporation created, chartered, and existing under and by virtue of the laws of the State of Georgia, having its principal office in the city of Savannah; that respondent, H. M. Comer, has been duly appointed by a competent court, receiver of the railroad of said last-mentioned company, and is now, and has for more than six months last past, been its receiver; and that R. Somers Hayes has lately been associated as coreceiver of the railroad of the said Central Railroad and Banking Company of Georgia.

Respondents deny that there is any such corporation as the "Georgia Railroad Company." There is a corporation known as the Georgia Railroad and Banking Company, and its railroad, in the State of Georgia, is operated under the name of "Georgia Railroad Company," with its principal office at Augusta, in the State of Georgia, and the above-named, the Central Railroad and Banking Company of Georgia, and the Louisville and Nashville Railroad Company, are the assignees of the lessee of said railroad. Respondents admit that respondent, The East Tennessee, Virginia and Georgia Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Tennessee, having its principal office at Knoxville, in the said State of Tennessee, and that respondents, Samuel Spencer, Charles M. McGhee, and Henry Fink, were duly appointed the receivers of the railroad of the said East Tennessee, Virginia and Georgia Railway Company; that defendant, The Southern Railway Company, a corporation created, chartered, and existing under and by virtue of the laws of the State of Virginia, having its principal office at Washington, in the District of Columbia, now owns, controls, and

28 operates the railways formerly operated by the said East Tennessee, Virginia and Georgia Railway Company; that respondent, The Memphis and Charleston Railroad Company, is a corporation created, chartered, and existing under and by virtue of the laws of Tennessee and Alabama, and that respondents, Samuel Spencer, Henry Fink, and Charles M. McGhee, of the city and State of New York, are now, and for more than six months last past have been, the receivers of the railroad of said Memphis and Charleston Railroad Company, controlling and operating the same; that respondent, The South Carolina Railway Company, is a corporation created, chartered, and existing under and by virtue of the laws of the State of South Carolina, having its principal office at Charleston, in the State of South Carolina, and that respondent, D. H. Chamberlain, is now, and for more than six months last past, has been the receiver of the railroad of the said South Carolina Railway Company; that defendant, The South Carolina and Georgia Railroad Company, is a corporation created, chartered, and existing under and by virtue of the laws of South Carolina, and that it now owns, controls, and operates the railways formerly operated by said South Carolina Railway Company; that each of the said above-described corporations and persons was, on the — day of December, 1892, or has

since become, a common carrier, engaged in the transportation of passengers and property wholly by railroad, by itself, or together with some one or more, or all, of the said other above-named defendants, between points in different States of the United States, and particularly from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina; but as to whether said defendants, or either of them, as such common carriers, so engaged in transportation as aforesaid, were, at the time aforesaid, or have been since, or are now, subject to any of the provisions of an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, or to the provisions of any of the amendments of said act, is a question of law, which is respectfully submitted to the consideration of the court.

2. Respondents admit that on or about the 29th day of December, 1892, the said H. W. Behlmer filed a petition before the Interstate Commerce Commission against respondents, The Memphis and Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, The South Carolina Railway Company, Henry Fink and Charles M. McGhee, as receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company, Daniel H. Chamberlain, as receiver of the South Carolina Railway Company, The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, as "lessee" of the Georgia railroad, and H. M. Comer, as receiver of the Central Railroad and Banking Company. Said petition was also filed against the Georgia Railroad and Banking Company. None of the other defendants to the petition filed in this court were made defendants to said petition filed before said commission. Respondents suppose it to be true that Exhibit "A" to the petition filed in this court is a true copy of said petition filed before said commission, but respondents have not seen said Exhibit "A."

Respondents deny that they, or either of them, or that any of their codefendants, were heretofore, on the — day of December, 1892, or on any other day, duly impleaded, either by themselves, or with other common carriers, before the Interstate Commerce Commission, because, as respondents are advised, said commission is not a court.

Respondents admit that said petition, filed before said commission, was filed for certain alleged violations on the part of said defendants thereto, of certain provisions of the "act to regulate commerce," as will more fully and at large appear in and by a true copy of said petition, when the same shall be produced; and respondents pray that it may be allowed to speak for itself, when so produced. As to whether the controversy raised by said petition is one not requiring a trial by jury, as provided for in the seventh amendment to the Constitution of the United States, is a question of law, which is respectfully submitted to the consideration of the court.

3. Respondents admit that afterwards, and forthwith, copies of the said petition, filed before the said commission, were duly served

upon the defendants named therein, with full and timely notice to satisfy the claim, or make answer thereto.

4. Respondents admit that afterwards answers to said petition, filed by said Behlmer before said commission, were filed by the defendants named in said petition, to wit: by The Louisville and Nashville Railroad Company, and The Central Railroad and Banking Company, and Charles M. McGhee and Henry Fink, receivers of the Memphis and Charleston Railroad Company, and The East Tennessee, Virginia and Georgia Railway Company, and by Daniel H. Chamberlain, receiver of the South Carolina Railway Company. Respondents suppose that said answers are on file in the office of said commission. Respondents suppose that Exhibit "B" to the petition filed in this court, contains true copies of said answers, annexed in consecutive order, as above set forth, but respondents have never seen said exhibit. They pray that said answers be allowed to speak for themselves, when true copies thereof shall be filed, if said exhibit does not already contain such copies.

5. Respondents admit that afterwards, the said parties being at issue upon said petition, filed before said commission, and the respective answers thereto, as aforesaid, the said matters were duly and regularly brought on for hearing and investigation before said Interstate Commerce Commission, duly and legally assembled for that purpose, at the city of Charleston, in the State of South Carolina, on the 4th day of April, 1893, when the said H. W. Behlmer, as well as the said East Tennessee, Virginia and Georgia Railroad Company, and said Memphis and Charleston Railroad Company, and said South Carolina Railway Company, and said Louisville and Nashville Railroad Company, and said Central Railroad and Banking Company of Georgia, duly appeared, by their attorneys.

6. Respondents deny that during the said hearing, or investigation, or at any other time, it was made to appear to the satisfaction of said commission that these respondents, or either of them, or any of the other defendants to said petition, filed before said commission, had violated the provisions of said "act to regulate commerce," in certain respects, or in any respect, either as was stated to have been violated by them in said petition, or in any other way.

Respondents deny that they, or either of them, or any of their codefendants in said petition, had, as a matter of fact, violated any of the provisions of said act, or of any of the amendments to said act, in any respect whatever, in regard to any of the matters referred to in said petition.

Respondents admit that on or about June 27th, 1894, said commission made a full report in writing, of its so-called findings of fact, in respect to such matters and things in controversy and at issue between said parties, and of its so-called conclusions, based upon such so-called findings of fact; and respondents suppose that Exhibit "C" to the petition, filed in this court, is a true copy of said report of said so-called findings and conclusions, but respondents have not seen said exhibit.

Respondents deny that said commission, on the 27th day of June, 1894, or on any other day, duly or legally determined the matters or things drawn in controversy, or at issue between said parties; or that said commission duly or legally determined any of said matters or things. On the contrary, respondents are advised, and insist that said so-called determination of said commission was, and is, in many material respects, erroneous, illegal, and void; and that said so-called findings of fact, reported by said commission, were, and are, erroneous and untrue in many material respects. Respondents are advised, and insist, that said conclusions of law, as determined by said commission from said so-called findings of fact, were erroneous and illegal in many material respects.

7. Respondents admit that thereafter, and forthwith, upon the so-called determination of said matters as aforesaid, said commission undertook to formulate an order and notice, based upon said so-called findings of fact and conclusions of said commission, as set forth in its said report hereinbefore referred to; and respondents suppose that Exhibit "D" to the petition, filed in this court, is a true copy of said order and notice; but respondents deny that said order and notice, or either of them, were lawful, or were duly made or entered, or that they were made agreeably to the provisions of the statutes in such cases made and provided.

8. Respondents admit that afterwards the said commission did cause a properly authenticated copy of its said report of so-called findings of fact and conclusions in said matters, together with a copy of said order and notice, to be delivered to each and all of the parties to the said petition, filed before said commission, their receivers and successors in operation.

31 It may be true that said commission has assumed to establish and promulgate certain rules of practice in cases and proceedings before it, whereby certain provision is assumed to be made for the showing of error, or of newly discovered material evidence, by parties against whom an adverse report and order may have been made by the commission, and also for the granting of rehearings upon such showing; but as to whether said commission had any legal authority to establish or promulgate such rules, is a question of law which is respectfully submitted to the court. At all events, respondents are advised that there is no law requiring a party, against whom said commission may have made an adverse report or order, to apply to said commission, either for the purpose of showing error, or presenting newly discovered evidence, or asking for a rehearing.

Respondents admit that none of the defendants to said petition filed before said commission, and that none of their receivers, or successors in operation, have filed or presented to said commission any application or petition for the rehearing of said matters, or any of them, or moved in any form, or taken any steps whatsoever, to vacate, set aside, alter, modify, or change said so-called findings of fact, conclusions, order, or notice.

Respondents are advised and insist that said report of findings and conclusions, and said order and notice, being illegal and void,

are of no effect, and therefore that the law does not contemplate that any application or motion shall be made to the commission to set aside its *ov. & void* order.

9. Respondents admit that after said report and so-called findings of fact and conclusions of said commission were filed, and its said order was made and entered as aforesaid, and on, and prior, and after the days that said report and said order and notice were delivered to the parties to the petition before said commission, the defendants to said petition, their receivers and their successors, did have, publish, keep in effect, and charge certain rates for the transportation of the kinds and classes of freight mentioned in said report and order, between the points mentioned and referred to in said report and order, which charges were, and are the same complained of in said petition filed before said commission, to wit: 28 cents per hundred pounds on hay, from Memphis, Tennessee, to Summerville, South Carolina; that said charges were, and have been made, for the transportation of hay or other commodities of the same kind or class of freight, from Memphis to Chattanooga, over the Memphis and Charleston railroad; from Chattanooga to Atlanta, over the East Tennessee, Virginia and Georgia railway; from Atlanta to Augusta, over the Georgia railroad; and from Augusta to Summerville, over the South Carolina railway. The Memphis and Charleston railroad was controlled by the East Tennessee, Virginia and Georgia Railway Company, through ownership of the majority of the capital stock; the Georgia railroad was operated by the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia, through its receiver, H. M.

32 Comer, as assignees of the lessee; the South Carolina railway was operated by its receiver, Daniel H. Chamberlain; the East Tennessee, Virginia and Georgia railway was operated by its receivers, Samuel Spencer, Henry Fink, and Charles M. McGhee. In no respect, other than as just stated, were any two of the defendants to the petition filed before said commission under any common control or management, for continuous carriage or shipment of passengers or property, by railroad or otherwise, between points in the State of Tennessee and points in the State of South Carolina, or between any other points. No two of the defendants to said petition filed before said commission, were under any common arrangement or agreement for the continuous carriage or shipment of passengers or property, by railroad or otherwise, between points in the State of Tennessee and points in the State of South Carolina, except that, for instance, said defendants to said petition had agreed upon a through rate of 28 cents per hundred pounds, from Memphis, Tenn., to Charleston, S. C., on hay and other commodities of the same kind and class of freight; the Memphis and Charleston Railroad Company, or its receivers when accepting freight at Memphis destined, say, to Summerville, S. C., would issue its bill of lading, and guaranty to the shipper that the total rate from Memphis to Summerville should not exceed the sum of the through rate from Memphis to Charleston, added to the local rate of the South Carolina Railway Company, from Charleston to Sum-

Summerville; and the carriers whose roads lay east of the eastern terminus of the Memphis and Charleston railroad would accept such shipment at their respective western termini, and carry the same over their respective roads, as one continuous shipment; each of said carriers demanding and receiving its proportion of the through rate from Memphis to Charleston, and the South Carolina Railway Company, or its receiver, receiving, in addition to its proportion of said through rate, its local rate from Charleston to Summerville.

10. Respondents admit that the through rate or charge maintained from Memphis, Tenn., to Charleston, S. C., is 19 cents per hundred pounds on hay; and that by adding thereto the local rate of the South Carolina Railway Company, of 9 cents per hundred pounds from Charleston to Summerville, the combination rate from Memphis to Summerville is 28 cents per hundred pounds; but they deny that said aggregate or combination rate of 28 cents per hundred pounds is either unreasonable or oppressive; on the contrary, they aver that it is just and reasonable.

11. Respondents admit that they have established and now maintain the said rates which they were by said order and notice of said commission, on or before July 15, 1894, notified and required wholly to cease and desist from charging, demanding, collecting or receiving.

Respondents admit that they, and each of them, did wilfully violate, disobey, disregard and wholly neglect and refuse to comply with the provisions and requirements of said order, and that they have continued, and do still continue, to wilfully violate, disobey, disregard and wholly neglect and refuse to comply with the

33 provisions of said order, and each and every requirement thereof, at Summerville, in the State of South Carolina, and at many other points on the several lines of roads operated by respondents. The reason why respondents have disregarded and refused to comply with the provisions and requirements of said order is because said order is illegal and void.

12. Respondents aver that Summerville, S. C., is situated on the South Carolina railroad one hundred and seventeen miles east of Augusta, and twenty-one miles west of Charleston. It has a population of about 2,200. It is not situated on any water-course, and has no railroad except the South Carolina railroad. There is no competition between carriers existing at that point.

13. Respondents aver that H. W. Behlmer, who filed said petition before said commission, and who filed the petition in this case in this court, carries on a wholesale hay and grain business in Summerville, S. C.; that he ordered, through his agents, F. D. C. Kracke's Sons, who do business in Charleston, S. C., the two car-loads of hay, to be shipped from Memphis, Tenn., to Summerville, the freight upon which was the subject-matter of complaint in the said petition, filed by him before said commission.

14. Respondents aver that said hay was carried over the Memphis and Charleston railroad, from Memphis to Chattanooga, a distance of 310 miles, over the East Tennessee, Virginia and Georgia railway from Chattanooga to Atlanta, a distance of 152 miles; over the

Georgia railroad from Atlanta to Augusta, a distance of 171 miles, and over the South Carolina railroad, from Augusta to Summerville, a distance of 117 miles. The total distance from Memphis to Summerville, via that route, is 750 miles. The total rate charged for transporting said hay from Memphis to Summerville was 28 cents per 100 pounds.

15. Respondents aver that the law of the State of Georgia authorizes and requires the railroad commission of that State "to make reasonable and just rates," to be observed by all the railroads of that State. Said commission has adopted and published a standard tariff, which is a scale of freight rates to be charged by railroads in Georgia. Said scale runs from one to four hundred and sixty miles. Said rates increase with the distance, but not in exact proportion with the distance. If said scale of rates were carried forward to seven hundred and fifty miles (the distance from Memphis to Summerville), a rate on hay of 31 cents per 100 pounds, for 750 miles, would result; which is 3 cents per 100 pounds more than the rate actually charged from Memphis to Summerville.

16. Respondents aver that the law of the State of South Carolina authorizes and requires the railroad commission of that State "to make reasonable and just rates," to be observed by all the railroads in that State. Said commission has adopted and published a standard tariff, which is a scale of freight rates to be charged by railroads in South Carolina. Said scale runs from one to three hundred and fifty miles. Said rates increase with the distance, but not in exact proportion with the distance. If said scale of rates were carried forward to 750 miles (the distance from Memphis to Summerville), a rate on hay of 35 cents per 100 pounds, for 750 miles, would result, which is 7 cents per 100 pounds more than the rate actually charged from Memphis to Summerville.

17. Respondents aver that a rate of 28 cents per 100 pounds, for transportation by railroad a distance of 750 miles, in the territory south of the Ohio and east of the Mississippi rivers, is reasonably low, as compared with the rates usually charged for such transportation by the railroads in that section of the country.

18. Respondents aver that the rate charged by wagons for transportation in the States of South Carolina and Georgia is \$1 per 100 pounds per hundred miles; and therefore respondents aver that the rate of 28 cents per 100 pounds for transportation of hay from Memphis to Summerville, is reasonably low, as compared with the rates usually charged for transportation by wagons, in that section of the country.

19. Respondents aver that the rate of 28 cents per 100 pounds on hay, from Memphis to Summerville, is just and reasonable, as compared with any known mode of land transportation, and is not unjust or unreasonably high, for the service rendered.

20. Respondents aver that the said Memphis and Charleston Railroad Company and its said receivers; the said East Tennessee, Virginia and Georgia Railway Company and its receivers; the said Louisville and Nashville Railroad Company, and the said Central

Railroad and Banking Company of Georgia (by its said receiver); and the said South Carolina Railway Company and its receiver, unite in forming a through route or line from Memphis, Tenn., via Chattanooga, Atlanta and Augusta, to Charleston, S. C.; and they unite in making and charging certain joint through rates on freight, from Memphis to Charleston. Their joint through rate on hay, from Memphis to Charleston, is 19 cents per 100 pounds. The distance from Memphis to Charleston, by said several roads, is 771 miles.

21. Respondents aver that said Memphis and Charleston railroad (an initial road at Memphis) and its connections; said Louisville and Nashville railroad (another initial road at Memphis), and its connections; the Kansas City, Memphis and Birmingham railroad (another initial road at Memphis), and its connections; and the Illinois Central railroad (another initial road at Memphis), and its connections, actively compete, at agreed rates, for through traffic between Memphis and Charleston.

Respondents aver that no two of said initial roads at Memphis are under any joint or common control, management, or arrangement, for the continuous transportation of freight or passengers.

Said initial roads at Memphis, and their respective connections, have been forced to agree upon said through rate of 19 cents per 100 pounds, from Memphis to Charleston, by reason not only of the active competition existing among themselves, but also by reason of active competition existing between said initial roads and their respective connections, on the one hand, and other carriers by rail

and by water, engaged in carrying hay to Charleston from cities other than Memphis, many of which latter carriers are not subject to the act to regulate commerce.

22. Respondents aver that said joint through rate of 19 cents per 100 pounds on hay, from Memphis to Charleston, is divided as follows:

The Memphis and Charleston R. R. Co. receives.....	7.2 cents.
The E. T., V. and G. R. R. Co. receives.....	3.2 cents.
The Georgia railroad receives.....	3.9 cents.
The Augusta transfer receives.....	1.5 cents.
The South Carolina Railway Co. receives.....	3.2 cents.

Total 19.0 cents.

23. Respondents further aver that from Augusta to Charleston there are two lines of railroad actively competing with each other, viz:

1st. The South Carolina railway, by which the distance from Augusta to Charleston is 138 miles.

2nd. The Port Royal and Augusta railroad, in connection with the Charleston and Savannah railroad, by which line the distance from Augusta to Charleston is 148 miles.

The last-mentioned line will accept, at Augusta, traffic coming from Memphis, destined to Charleston, and carry it from Augusta to Charleston at the same proportion of the joint through rate from

Memphis to Charleston as is accepted by the South Carolina railway ; which proportion, on hay, is as shown above, 3.2 cents per 100 pounds.

24. Respondents aver that it is 21 miles from Charleston to Summerville. The local rate charged by the South Carolina railway, on hay, from Charleston to Summerville is 9 cents per 100 pounds. The standard tariff of the South Carolina railroad commission, referred to above, allows the railroads of that State to charge, on hay, a rate of 9 cents per hundred pounds, for a distance of 21 miles : and said tariff was adopted, as stated above, under a law of that State, which authorized and required said commission to make just and reasonable rates.

Respondents aver that said rate of 9 cents per 100 pounds for transporting hay a distance of 21 miles by railroad in South Carolina, is just and reasonable for the service rendered ; that it is just and reasonable, as compared with the rates charged by other railroads in that section of the country ; that it is much lower than rates charged by wagons in that section of the country, and much lower than the rates charged by any other known mode of land transportation.

25. Respondents aver that the rate of 28 cents per 100 pounds on hay, from Memphis to Summerville, is, as stated above, a combination rate ; that it is arrived at by taking the joint through rate of 19 cents per 100 pounds from Memphis to Charleston, and adding thereto the local rate of the South Carolina railroad of 9 cents per 100 pounds from Charleston to Summerville, thus making a total combination rate of 28 cents per 100 pounds from Memphis via Charleston, to Summerville.

Respondent companies, whose respective roads lie west of Augusta, could have delivered the hay of petitioner, Behlmer, to the Port Royal and Augusta railroad at Augusta. It would then have been carried by that road, and its connection, the Charleston and Savannah railroad, to Charleston, for their proportion (*i. e.*, 3.2 cents per 100 pounds) of the joint through rate (19 cents) from Memphis to Charleston. From Charleston it would have been carried to Summerville by the South Carolina railway at 9 cents ; making the total rate from Memphis via Charleston to Summerville, 28 cents per 100 pounds, which is exactly the rate which was charged to said Behlmer, and for which he made complaint.

The route from Memphis to Charleston via the Port Royal and Augusta railroad and its connection, the Charleston and Savannah railroad, is only ten miles longer than the route via the South Carolina railroad.

If the order made by the commission in this case shall be enforced, the respondent companies, whose respective roads lie west of Augusta, will be forced either to withdraw from competition between Memphis and Charleston, or to deliver traffic to the Port Royal and Augusta railroad, at Augusta, when destined to local stations on the South Carolina railway, and to deliver traffic to the South Carolina railway, at Augusta, when destined to local stations on the Charleston and Savannah railroad, or the Port Royal and

Augusta railroad. In the latter event all the traffic to any of said local stations will pass through Charleston, and will be charged local rates from Charleston to destination. The result will be that shippers will pay the same rate as now from Memphis to destination, and the traffic will be subjected to the danger and delay occasioned by the unnecessary distance over which it will have to be hauled. Neither the shippers nor the railroads will be benefitted by such an arrangement, but on the contrary, all of them will be injured thereby.

26. Respondents aver that they have never made or issued any joint through tariff of rates from Memphis to Summerville, and have never formed any through line, or route, from Memphis to Summerville. If the said Memphis and Charleston Railroad Company should undertake to guaranty a total rate from Memphis to Summerville, less than 28 cents per 100 pounds on hay, it would be a contract of its own making, for which the other respondents would not be in anywise responsible; they would insist upon their proper respective proportions of the joint through rate of 19 cents per 100 pounds on hay, from Memphis to Charleston, and the South Carolina Railway Company would insist upon its local rate of 9 cents per 100 pounds, from Charleston to Summerville, in addition to its proportion of said through rate, and such loss as might ensue from the rate guaranteed by the Memphis and Charleston Railroad Company, would fall upon that company alone.

27. Respondents aver that the proportions which the respondent companies, whose roads lie west of Augusta, receive of the rate charged on hay shipped from Memphis to Summerville, are the proportions to which they are respectively entitled of the joint through rate charged on hay shipped from Memphis to Charleston (*i. e.*, 19 cents per 100 pounds). They do not participate at all in the local rate of 9 cents per 100 pounds, charged by the South Carolina railway, from Charleston to Summerville, and it is a matter of no consequence to them whether hay, shipped from Memphis, stops at Summerville, or goes on to Charleston.

28. Respondents aver that the respondent companies whose roads lie west of Augusta, charge a joint through rate of 23 cents per 100 pounds on hay, from Memphis to Augusta, for points beyond. Said rate includes a transfer charge at Augusta.

The South Carolina Railway Company charges a local rate of 15 cents per 100 pounds on hay, from Augusta to Summerville; which rate is less than the rate allowed to be charged by said standard tariff of the South Carolina railroad commission.

If the said Behlmer had been charged the joint through rate from Memphis to Augusta (23 cents per 100 pounds) and also the local rate of the South Carolina railway, from Augusta to Summerville (15 cents per 100 pounds), the total charge from Memphis to Summerville would have been 38 cents per 100 pounds. But the said Behlmer, by getting the benefit of the joint through rate from Memphis to Charleston (19 cents per 100 pounds), and the local rate of the South Carolina railway, from Charleston to Summerville (9

cents per 100 pounds), secured a total rate from Memphis to Summerville of only 28 cents per 100 pounds.

29. Respondents aver that the joint through rate, from Memphis to Charleston, of 19 cents per 100 pounds on hay, pays to each of the carriers engaged in its transportation, a small profit over the additional cost incurred by them respectively in its transportation, but that said rate is so low it would be impossible for said carriers to reduce their respective local rates on hay, to the proportions which they respectively receive, of said through rate; and to require them to do so would be to compel them to carry hay, and other commodities of the same kind and class of freight, at less than it actually cost them to carry it.

30. Respondents aver that for the year ending June 30th, 1892, the estimated average cost of hauling all kinds of freight over said South Carolina railway, was 7.38 mills per ton per mile; that a locomotive engine can haul from 33 to 35 cars from Augusta to Charleston; that the average number of freight cars which were hauled in trains, over this railway, was 28; that the average number of loaded freight cars in a train was 16, and the average number of empty freight cars was 12; that the average number of tons freight, in each loaded car, was 6.40; and that an average of from 5 to 7 loaded freight cars could have been hauled in trains over said railway, in addition to the average number of cars actually hauled in said trains, with no additional cost for train crews, and with but little additional cost for fuel, water, waste and wear and tear of cars and track.

31. Respondents aver that the proportion which said South Carolina Railway Company, or its receiver, receives of said joint
38 through rate, from Memphis to Charleston, of 19 cents per 100 pounds, on hay, is equal to 4.6 mills per ton per mile; that while said rate yields a slight profit over the additional cost incurred by said railway in transporting full loaded cars of hay, over its entire line from Augusta to Charleston, the estimated cost of carrying one ton of freight one mile upon said road, for said year, was 7.38 mills; and if said railway were required to carry all of its freight at 4.6 mills per ton, per mile, said railway could not pay its own expenses, but, on the contrary, would sustain an aggregate loss, per annum, of \$206,584.68.

32. Respondents aver that hay is shipped to Charleston, S. C., from Chicago, St. Louis, East St. Louis, Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, Cairo, East Cairo, Belmont, Columbus, and Memphis; also from Boston, New York, Philadelphia, Baltimore, Norfolk, etc.

The all-rail rate on class D (Southern Railway and Steamship Association classification), which includes hay, from Chicago to Charleston, via Ohio River points, is 33 cents per 100 pounds. The all-rail rate on hay, from St. Louis and East St. Louis to Charleston, is 28 cents per 100 pounds; or 5 cents per 100 pounds less than the all-rail rate from Chicago to Charleston.

The all-rail rate on hay, from Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, Cairo, East Cairo, Belmont,

and Columbus, to Charleston, is 23 cents per 100 pounds; or 10 cents per 100 pounds less than the all-rail rate from Chicago to Charleston.

The all-rail rate on hay from Memphis to Charleston is 19 cents per 100 pounds; or 14 cents per 100 pounds less than the all-rail rate from Chicago to Charleston.

Active competition has existed for many years between Chicago, and the above-named cities on the Mississippi and Ohio rivers, in the sale of hay and other farm products, in Charleston, and other southeastern cities. A rate on hay, by lake and canal, can be obtained from Chicago to New York, of 12 cents per 100 pounds; and by ocean from New York to Charleston, of 8 cents per 100 pounds, making a total water rate, from Chicago, via New York, to Charleston, of 20 cents per 100 pounds. The rail and water rate from Chicago to Baltimore is 12 cents per 100 pounds. The schooner rate from Baltimore to Charleston is 4 cents per 100 pounds; making a total rail and water rate, on hay, from Chicago, via Baltimore, to Charleston, of only 16 cents per 100 pounds.

33. Active competition has existed for many years between Chicago, and the above-named cities on the Mississippi and Ohio rivers; and said cities on the Mississippi and Ohio rivers have been in active competition as between themselves, in the sale of hay and other farm products, in Charleston and other southeastern cities.

The competition which has existed between said cities, and the competition which has existed between the all-rail lines which serve them, resulted many years ago in establishing certain relations between the all-rail rates which should obtain from those cities

39 respectively, to Charleston and other southeastern cities. The relation between said all-rail rates as they now exist, is as stated above; and, with some modification from time to time, such relation has existed for a long period of time; and to change said relation in the case of one of said cities, as, for instance, by raising the all-rail rates from Memphis to Charleston, without raising the all — rates from said other cities to Charleston, would inflict great injury upon the commerce of Memphis, and upon the rail lines serving that city. The traffic for Charleston would move by rail lines leading from those cities whose all-rail rates had not been raised, or from Chicago by water, and the rail lines leading from Memphis would be deprived of the opportunity to compete for the traffic.

The ocean rate, via the Clyde Steamship Company, on hay, from Boston to Charleston, is 20 cents per 100 pounds.

The ocean rate, via the Clyde Steamship Company, on hay, from New York and Philadelphia, to Charleston, is 14 cents per 100 pounds; in fact a rate of 8 cents per 100 pounds, from New York to Charleston, has been and can be obtained.

The rail and water rate, on hay, from Baltimore to Charleston, is 17 cents per 100 pounds; and the schooner rate, on hay, from Baltimore to Charleston, is about 4 cents per 100 pounds.

Frequently cargoes of grain (which take the same rate as hay) are shipped to Charleston, from Norfolk, Va., and other Virginia ports,

at such low rates as to enable the consignees of such cargoes to undersell, in the Charleston market, those who buy grain and hay in the West, and ship it to Charleston via Memphis or other points on the Mississippi and Ohio rivers.

If respondents' rates on hay and grain, from Memphis to Charleston, should be raised from 19 to 25, or even to 23 cents per 100 pounds, hay and grain could not be shipped from Memphis to Charleston. They would be shipped from New York and other north Atlantic and Virginia ports to Charleston.

The rate on hay, from Memphis to Charleston, was reduced from 23 cents to 19 cents per 100 pounds, in August, 1891; and said reduction was forced upon the carriers operating between Memphis and Charleston by the low rail and water rates which then obtained through and from New York and other north Atlantic and Virginia ports; and if the all-rail lines, operating between Memphis and Charleston should now raise the rate on hay to 28 cents per 100 pounds, or even to 23 cents per 100 pounds, from Memphis to Charleston, they would lose the traffic entirely, as it would return to said water lines, or to said rail and water lines.

34. Respondents aver that at the time the testimony in this case was taken before the commission, the price of hay in New York was \$15.00 per ton, as compared with \$12.70 per ton, in Memphis.

The ocean rate on hay from New York to Charleston was from \$1.60 to \$2.80 per ton; and the rate on hay from Memphis to Charleston, via respondents' line, was \$3.80 per ton. Hay purchased at New York, with freight added, would cost, delivered at Charleston, from \$16.60 to \$17.80 per ton, depending upon
40 the ocean rate that happened to obtain at the time. Hay purchased at Memphis, with freight added, would cost, delivered at Charleston, \$16.50 per ton.

35. The cities of Boston, New York, Philadelphia, Baltimore, Norfolk, etc., compete with each other, and also with Chicago, and also with the above-named cities on the Ohio and Mississippi rivers, in the sale of hay, grain, etc., in Charleston and other southeastern cities.

The rail lines, the water lines, and the rail and water lines, running from Boston, New York, Philadelphia, Baltimore, Norfolk, etc., compete with each other, and also with the various lines of transportation running from Chicago, and also with the various lines of transportation running from the above-named cities on the Ohio and Mississippi rivers, including Memphis, in the carriage of hay, grain, etc., to Charleston and other southeastern cities.

And the rates which respondents can obtain on hay, from Memphis to Charleston, are controlled by the rates offered by their competitors.

Respondents having fully answered, pray to be hence dismissed, with their reasonable costs in this behalf expended, and that the restraining order, which was heretofore granted in this case, with-

out notice to either of them, be rescinded and set aside, as in duty bound they will ever pray, etc.

BRAWLEY & BARNWELL,
Solicitors for the South Carolina Railway Co.
and D. H. Chamberlain, Receiver.

W. A. HENDERSON,
Solicitor for the Memphis and Charleston Railroad Co., the
East Tennessee, Virginia and Georgia Railway Co., and
Samuel Spencer, Henry Fink, and Charles M. McGhee,
Receivers.

JOS. B. CUMMING,
ED. BAXTER,
Solicitors for the Louisville and Nashville Railroad Co. and
Central Railroad and Banking Co. of Georgia, as Assignees
of the Lessee of the Georgia Railroad, and H. M. Comer,
Receiver.

To this answer, filed respectively on the 21st and 22d of November, 1894, and the 1st of December, 1894, the following affidavits are appended :

STATE OF GEORGIA, }
Richmond County. }

Personally appeared before me, Wm. Lyon Martin, duly appointed, commissioned and qualified, in and for the State and county aforesaid, Hugh M. Comer, who is personally known to me to be the receiver of the railroads of The Central Railroad and Banking Company, one of the above-named respondents, and he, being duly sworn, deposed that the facts stated in the foregoing answer as of respondent's own knowledge are true, and that
41 those stated as upon information are true, to the best of his knowledge, information, remembrance and belief.

HUGH M. COMER,
Receiver of the Central R. R. and Banking Co.

Sworn to and subscribed before me, this 20th day of November, 1894.

[SEAL.]

WM. LYON MARTIN,
Notary Public, Richmond County, Ga.

STATE OF GEORGIA, }
Richmond County. }

Personally appeared before me, a notary public, duly appointed, commissioned and qualified, in and for the State and county aforesaid, Thomas K. Scott, who is personally known to me to be general manager of the Georgia Railroad Company, and he being duly sworn, deposed that he had read the foregoing answer, and that the facts stated therein as of deponent's own knowledge are true, and that those stated as upon information are true, to the best of his knowledge, information, remembrance and belief.

THOS. K. SCOTT,
Gen'l Manager Georgia R. R. Co.

Sworn to and subscribed before me, this 20th day of November, 1894.

[SEAL.]

WM. LYON MARTIN,
Notary Public, Richmond County, Ga.

STATE OF NEW YORK, }
City and County of New York. }

Personally appeared before me, Simon F. Sullivan, a notary public, duly qualified to act in and for the State, city and county aforesaid, Charles M. McGhee and Henry Fink, who are personally known to me to be the receivers of The Memphis and Charleston Railroad Company, one of the above-named respondents, and they being duly sworn, deposed that the facts stated in the foregoing answer as of their own knowledge are true, and that those stated as upon information are true to the best of their knowledge, information, remembrance and belief.

C. M. MCGHEE.
HENRY FINK.

Witness my hand and notarial seal this 22d day of November, A. D. 1894.

[SEAL.]

S. F. SULLIVAN,
Notary Public, Kings County.

Certificate filed in New York county.

STATE OF KENTUCKY, }
County of Jefferson. }

Personally appeared before me, G. W. B. Olmstead, a notary public, duly appointed, commissioned and qualified in and for the State and county aforesaid, Stuart R. Knott, who is personally known to me to be the first vice-president of The Louisville and Nashville Railroad Company, one of the above-named respondents, and he being duly sworn, deposed that the facts stated in the foregoing answer as of respondent's own knowledge are true, and that those stated as upon information are true, to the best of his knowledge, information, remembrance and belief; and as testimony that the foregoing is the answer of said company, he affixed thereto the corporate seal of said company in my presence.

[CORPORATE SEAL.]

S. R. KNOTT,
Vice-President L. & N. R. R. Co.

Attest :

F. ELLIS,
Secretary L. & N. R. R. Co.

Witness my hand and notarial seal of office this 19th day of November, A. D. 1894. My commission expires January 5th, 1898.

[NOTARIAL SEAL.]

G. B. W. OLMSTEAD,
Notary Public.

Order Dissolving Temporary Injunction.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit. In Equity.

H. W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD ET AL. }

On motion of Edward Baxter and Jos. W. Barnwell, counsel for respondents in this case, it is—

Ordered, that the temporary injunction granted in this case, on the 2d day of November, 1894, against the defendants therein named, be set aside, without prejudice to the rights of the petitioner on the hearing of the cause.

CHARLES H. SIMONTON,
Circuit Judge.

Filed November 21st, 1894.

The Separate Answer of the South Carolina and Georgia Railroad Company.

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

The separate answer of the South Carolina and Georgia Railroad Company to the petition filed by H. W. Behlmer against this respondent and others in the circuit court of the United States for the district aforesaid, in equity.

43 This respondent now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said petition contained for answer thereto or to so much thereof as this respondent is advised is material or necessary for it to make answer to, answering says:

1. Respondent admits that H. W. Behlmer, the petitioner in this case, is a citizen and resident of the town of Summerville, in the State of South Carolina and that this respondent is a corporation existing under and by virtue of the laws of the said State of South Carolina and that this respondent now owns, controls and operates the railway formerly operated by the South Carolina Railway Company, but this respondent has so owned said railway only since the twelfth day of May, 1894, since which time it has been a common carrier engaged in the transportation of passengers and freight wholly by railroad together with one or more of its co-respondents

between points in different States of the United States and respondent admits that it has transported freight which it is informed and believes came from Memphis, Tennessee, to Summerville in the State of South Carolina.

2. This respondent denies that it has heretofore been impleaded either by itself or with other common carriers before the Interstate Commerce Commission as alleged in said petition and this respondent further says that at the time when said original petition was filed by H. W. Behlmer before the Interstate Commerce Commission, and at the time the proof was taken thereon, and at the time when the issues made under said petition were heard, this respondent was not in existence. And this respondent submits that the proceedings had upon said original petition and the findings and orders made thereupon by said commission do not bind nor affect this respondent in any way whatsoever; it was not before said commission in any way or for any purpose whatever. That the railway and property of the South Carolina Railway Company under the order and decree of this court were sold on the twelfth day of April, 1894, to Gustave E. Kissel and others and the sale thereof having been confirmed by this court on the twenty-fourth day of April in said year a conveyance of the said railway and the property of said company was made to said Gustave E. Kissel and others on the first day of May in said year, by the special master of this court and said Kissel and others on the twelfth day of May in said year, conveyed the same to this respondent and this respondent denies that any order and notice from the said Interstate Commerce Commission directing this respondent to do or abstain from doing anything whatever has ever been served upon this respondent. And this respondent is not bound by any of the proceedings referred to in the petition herein as having taken place before said Interstate Commerce Commission.

3. This respondent although it is advised that it is not bound to make further answer to the petition in this cause, yet further submits that it is informed and believes that the joint and several answer filed by its codefendant The Louisville and Nashville

44 Railroad Company and others truly and correctly states the facts relating to the proceedings had upon said original petition filed by the said petitioner before said Interstate Commerce Commission and also the facts relating and pertaining to the matters and things alleged and averred in said original petition, and therefore this respondent if required to make further answer to the statements contained in the present petition relies upon the facts and statements contained in the aforesaid answer of its said co-respondents as fully as if the same were repeated and set out herein.

4. And this respondent having fully answered prays to be hence dismissed with its reasonable costs in this behalf sustained, and it will ever pray and so forth.

JOS. W. BARNWELL,
Respondents' Solicitor.

UNITED STATES OF AMERICA, }
 State of South Carolina. }

Personally appeared before me E. S. Bowen, who being duly sworn says that he is an officer and agent of the above-named corporation, the South Carolina and Georgia Railroad Company, to wit: the general manager thereof, and that the matters and things therein stated, so far as they are derived from his own knowledge, are true, and so far as they depend upon the information of others he believes them to be true.

E. S. BOWEN.

Sworn to before me this eighth day of January, 1896.

W. TURNER LOGAN,
 Notary Public.

Filed January 14, 1896.

The Separate Answer of the Southern Railway Company.

Circuit Court of the United States for the District of South Carolina.

H. W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL. }

The separate answer of the Southern Railway Company to the petition filed by H. W. Behlmer against this respondent and others in the circuit court of the United States for the district of South Carolina, in equity.

This respondent now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said petition contained, for answer thereto, or to so much as this respondent is advised is material or necessary for it to make answer to, answering says:

45 1. Respondent admits that H. W. Behlmer, the petitioner in this case, is a citizen and resident of the town of Summerville, in the State of South Carolina; that this respondent, The Southern Railway Company, is a corporation created, chartered and existing under and by virtue of the laws of the State of Virginia, and having its principal office at Washington, in the District of Columbia; that this respondent now owns, controls and operates the railways formerly owned and operated by the East Tennessee, Virginia and Georgia Railway Company, but has so owned said railways only since the 14th day of July, 1894, and has operated them only since the first day of August, 1894, since which last-named date it has been a common carrier engaged in the transportation of passengers and freight wholly by railroad, together with one or more of its co-respondents, between points in different States of the United States, and particularly from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina; but as

to whether this respondent as such common carrier, so engaged in transportation as aforesaid, has been since said first day of August, 1894, — is now subject to any provisions of an act of Congress of the United States, entitled An act to regulate commerce, approved February 4th, 1887, or to the provisions of any of the amendments of said act, is a question which, if material, is respectfully submitted to the consideration of the court.

2. Respondent denies that it has heretofore, on the 29th day of December, 1892, or on any other day duly impleaded either by itself or with other common carriers, before the Interstate Commerce Commission, as alleged in said petition. At the time said original petition was filed by H. W. Behlmer before the Interstate Commerce Commission, and at the time the proof was taken thereon, and at the time the issues made upon said petition were heard, this respondent was not even in existence. And the proceedings had upon said original petition, and the findings and orders made thereupon by said commission do not bind or affect this respondent in any way whatsoever, because it was not before said commission, in any way or for any purpose whatever. The railways and property of the East Tennessee, Virginia and Georgia Railway Company were afterwards, under orders and decrees of the United States circuit court for the eastern district of Tennessee, and in the States of Georgia, Alabama and Mississippi put up at public sale to the highest bidder, and were bid off by this respondent, and on, to wit: July 14th, 1894, and subsequent days prior to August 1st, 1894, said sale to this respondent was confirmed by said courts, and until said confirmation this respondent had no right in or control over said railway and properties or any part thereof.

Afterwards, to wit, on the first day of August, 1894, this respondent came into possession of said railways and properties formerly owned by said East Tennessee, Virginia and Georgia Railway Company, and since that date, and not before, has been controlling and operating the same. This respondent simply became the
46 purchaser of said railways and properties as any other purchaser would have done, and in no way became responsible for any of the supposed or real wrongs, omissions or mistakes of the former owners, and it respectfully insists that it is now in no way answerable therefor, if any such exist. And this respondent is advised and insists that it is not bound by any of the proceedings had upon the petition of H. W. Behlmer before said Interstate Commerce Commission.

3. This respondent is advised and insists that it is not bound by the law and by the practice of this court to make further answer to the petition in this cause, but if mistaken in this position and not otherwise, then this respondent for further answer says: It is informed and believes that the joint and several answer filed in this cause by its codefendants, The Louisville and Nashville Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, and others, truly and correctly states the facts relating to the proceedings had upon said original petition filed by the aforesaid petitioner before said Interstate Commerce Commission, and also

the facts relating and pertaining to the matters and things alleged and averred in said original petition; and therefore, if compelled by law to make answer to the statements contained in the present relating thereto, this respondent relies upon the facts and statements contained in the aforesaid answer of its said co-respondents as fully as if the same were repeated and set out herein.

4. And this respondent having now fully answered, prays to be hence dismissed with its reasonable costs in this behalf expended, and that the restraining order that was heretofore granted in this case without notice to this respondent be rescinded and set aside; and as in duty bound, it will ever pray, &c.

W. A. HENDERSON,
A. G. C. for Southern Railway Company.

STATE OF NEW YORK, }
City and County of New York. }

Personally appeared before me Simon F. Sullivan, a notary public, duly appointed, commissioned and qualified, in and for the State and county aforesaid, Samuel Spencer, who is personally known to me to be the president of The Southern Railway Company, the above-named respondent, and he, being duly sworn, deposed that the facts stated in the foregoing answer, as of respondent's own knowledge are true, and that those stated as upon information are true to the best of his knowledge, information, remembrance and belief; and in testimony that the foregoing is the answer of said company, he had affixed thereto the corporate seal of said company, in my presence.

[SEAL.]

SAMUEL SPENCER,
President Southern Railway Company.

Witness my hand and notarial seal of office, this 28th day of December, A. D. 1894.

[SEAL.]

S. F. SULLIVAN,
Notary Public, Kings County.

Certificates filed in New York county, New York.
Filed 1st January, 1895.

47 *Replication of H. W. Behlmer.*

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit. In Equity.

H. W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE R. R. CO. ET AL. }

Replication of H. W. Behlmer.

In this case the defendants, The Louisville and Nashville Railroad Company, The Central Railroad and Banking Company of

Georgia, H. M. Comer, receiver of the railroad of said last-mentioned company, The Memphis and Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, Samuel Spencer, Henry Fink and Charles M. McGhee, receivers of the railroads of the said last two mentioned companies, The South Carolina Railway Company and Daniel H. Chamberlain, receiver of the railroad of said last-mentioned railway company, having filed their joint and several answers to the petition in this case, now this repliant saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto saith that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or availed, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

CLAUDIAN B. NORTHROP,
Solicitor for Plaintiff.

Filed December 29, 1894.

Circuit Court of the United States for the District of South Carolina.

H. W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL. }

In this cause, it is stipulated, and agreed by counsel, that the copy of the testimony which was taken before the Interstate Commerce Commission in the case of H. W. Behlmer *vs.* The Memphis and Charleston Railroad Company *et al.*, at Charleston, S. C., on April 4, 1893, and which copy has been duly certified by Edw. A. Moseley, secretary of said commission, under date of December 14, 1894, and which is here filed as Exhibit A, and made part hereof, may be read on the hearing of this cause, as though it had been taken in this court, subject to all legal objections for incompetency or irrelevancy. Either party may have until the 15th day of April, 1895, in which to take additional testimony. Such testimony may be taken before any notary public, duly qualified, and authorized to take depositions, at the place where the same shall be taken. The depositions may be taken down upon a typewriter, or in shorthand, and afterwards typewritten, or they may be taken in longhand. Notices to take depositions, issued by defendants, may be served by leaving a copy thereof at the office of Claudian B. Northrop, Esq., Charleston, S. C., and notices to take

depositions, issued by complainant, may be served by leaving a copy thereof at the office of Hon. Jos. W. Barnwell, Charleston, S. C. It shall be sufficient notice to allow twenty-four hours to get ready, and such additional time as may be necessary to reach the place fixed in the notice, by the usual traveled route.

This 27th day of February, 1895.

CLAUDIAN B. NORTHROP,
Solicitor for Complainant.

ED. BAXTER,
Solicitor for Defendants.

Filed August 18, 1895.

"EXHIBIT A."

Testimony Taken Before Commission.

The Chairman: Well, gentlemen, are you ready to proceed?

Mr. Northrop: If your honors please, I do not think we need to offer any further proof as to the published rates. I suppose the admission of the common control, management and arrangement by the Memphis and Charleston and the East Tennessee roads will carry with it the admissions of the other roads as to the material facts. The South Carolina and Georgia roads state certain justificatory facts, first, that they are obliged to charge an unreasonably low rate to Charleston, which is produced by eight competing lines that come in here, and further that they are subject to competition by sea on hay, grain and freight of that class, originating in New York and other eastern points and further that they are subject to competition as to the same freight from Chicago via the lakes and rail and down by the coast. It seems the burden is on them to establish that. However, as the Memphis and Charleston road denies that it has a through rate to this point, we beg to submit their published tariffs—freight tariff No. 25, supplement No. 7, on page 15, shows the rate to Summerville on class D to be 28 cents. We introduce in evidence freight tariff No. 25 of the Memphis and Charleston railroad and supplements Nos. 1, 2, 3, 4, 5 and 7 to said freight tariff. On page 39 of this tariff class D is given 33 cents to Summerville and 24 cents to Charleston; supplement No. 5 to said freight tariff No. 25 shows a rate on page 1 to Charleston of 19 cents; supplement No. 7, page 15, shows a rate to Summerville, class D, 28 cents. Southern Railway and Steamship R. C. circular No. 22, series 1890-1891, shows class D to be hay (see page 260); oats (see page 69); corn (see page 251); wheat (see page 284). As to the charges on these two car-loads of hay, they are admitted in the answers.

Com'r Knapp: You complain of a violation of the long and short haul clause?

Mr. Northrop: Yes, sir.

Com'r Knapp: Does your complaint extend to traffic generally, or only to some particular commodities?

Mr. Northrop: We have alleged all interstate traffic. We say:

"that all the above-mentioned lines are members of the Southern Railway and Steamship Association, and that the discrimination and excessive rates against Summerville exists not only on hay, as above set forth, but on all articles of interstate commerce coming to that place, much to the detriment and disadvantage of the town and the business of its merchants."

Com'r Knapp: Your complaint shows the location of this town and the line, etc.?

Mr. Northrop: Yes, sir.

The Chairman: Who represents the respondents?

Mr. Baxter: I appear for the Louisville and Nashville Railroad Company and the Georgia Railroad Company.

Mr. E. P. Waring (G. F. and P. A., South Carolina R'y): Mr. Barnwell represents the South Carolina Railway Company, but he has not come yet. I will find out if he is coming.

Mr. Baxter: The Louisville and Nashville Railroad Company and the Central Railroad of Georgia lease the Georgia railroad, and I represent them.

The Chairman: There is substantially but one question in the case, Mr. Baxter?

Mr. Baxter: Yes, sir.

The Chairman: Well, gentlemen, you may proceed.

Mr. Northrop: I will put Mr. Behlmer on the stand.

Freight tariff No. 25 of the Memphis and Charleston railroad and supplements Nos. 1, 2, 3, 4, 5 and 7 to said freight tariff, above referred to by Mr. Northrop, are on file in the office of the auditor of the Interstate Commerce Commission.

H. W. BEHLMER, the complainant, being duly sworn, testified as follows:

Mr. Northrop: What is your business?

Mr. Behlmer: Wholesale hay and grain.

Mr. Northrop: Do you propose to do a larger business in Summerville?

Mr. Behlmer: If I get the rate.

Mr. Northrop: In what way?

Mr. Behlmer: On car-load lots.

Mr. Northrop: And you think of going into manufacturing enterprises there?

50 Mr. Behlmer: Yes, sir.

Mr. Northrop: Why cannot you do that now?

Mr. Behlmer: The rate is too great.

Mr. Northrop: What is the rate?

Mr. Behlmer: The rate to Summerville is 28 cents a hundred on hay from Memphis, and the rate to Charleston is 19 cents.

Mr. Northrop: And the same on grain?

Mr. Behlmer: Yes, sir.

Mr. Northrop: How is the rate made up?

Mr. Behlmer: It is the rate to Charleston and the 9 cents local rate from Charleston up again.

Mr. Northrop: Hay is not taken past Summerville?

Mr. Behlmer: No, sir; it is left there.

Mr. Northrop: Are there facilities in Summerville?

Mr. Behlmer: Yes, sir.

Mr. Northrop: No trouble in switching off?

Mr. Behlmer: No, sir.

Mr. Northrop: Do you think that rate of 28 cents from Memphis to Summerville is unreasonably high?

Mr. Behlmer: That is what I think.

Mr. Northrop: That is all.

Cross-examination:

Mr. Baxter: Who did you buy your hay from?

Mr. Behlmer: F. D. C. Kracke's Sons.

Mr. Baxter: Are they merchants?

Mr. Behlmer: No, they are agents for these parties at Memphis.

Mr. Baxter: Agents for somebody?

Mr. Behlmer: They are agents for everything in that line, in the hay and grain business.

Mr. Baxter: They are located at Charleston?

Mr. Behlmer: Yes, sir.

Mr. Baxter: You ordered your hay at Charleston?

Mr. Behlmer: I ordered it through them.

Mr. Baxter: But you ordered it at Charleston to be shipped from Memphis to Summerville?

Mr. Behlmer: Yes, sir.

Mr. Baxter: Do you know where the hay shipped from the Memphis market is raised?

Mr. Behlmer: No, sir; I do not.

Mr. Baxter: Where do you expect to sell the products of the mill you expect to start?

Mr. Behlmer: In Summerville and a little higher up.

Mr. Baxter: You expect to ship it away?

Mr. Behlmer: Yes, sir.

Mr. Baxter: To what points?

Mr. Behlmer: To Georgia stations.

Mr. Baxter: That is all.

Redirect examination:

Mr. Northrop: You paid for these car-load lots of hay at Summerville?

51 Mr. Behlmer: Yes, sir.

Mr. Northrop: On a through bill from Memphis to Summerville?

Mr. Behlmer: Yes, sir.

Mr. Northrop: Over what roads?

Mr. Behlmer: The Memphis and Charleston railroad, to Chattanooga; the East Tennessee, Virginia and Georgia, from Chattanooga

to Atlanta; the Georgia railroad, from Atlanta to Augusta, and the South Carolina railway to Summerville.

Mr. Northrop: Grain comes the same way?

Mr. Behlmer: Yes, sir.

Mr. Northrop: That is all.

A. G. JACKSON, a witness on behalf of the defendants, having been duly sworn, testified as follows:

Mr. Baxter: Where do you reside?

Mr. Jackson: In Augusta.

Mr. Baxter: What road are you connected with, and how long have you been connected with it?

Mr. Jackson: The Georgia railroad; have been connected with it since April 1, 1892.

Mr. Baxter: In what capacity are you connected with it?

Mr. Jackson: As general freight and passenger agent.

Mr. Baxter: With what road, if any, were you connected with before you were connected with the Georgia railroad?

Mr. Jackson: Immediately prior to my connection with the Georgia railroad, I was connected with the Western and Atlantic railroad.

Mr. Baxter: That is a road from Chattanooga to Atlanta?

Mr. Jackson: Yes, sir.

Mr. Baxter: What was the character of your connection with the Western and Atlantic?

Mr. Jackson: I was freight agent at Atlanta.

Mr. Baxter: And prior to your connection with that road?

Mr. Jackson: I was connected with the Nashville, Chattanooga and St. Louis railroad.

Mr. Baxter: For how many years?

Mr. Jackson: About 10 years.

Mr. Baxter: In what capacity?

Mr. Jackson: Immediately prior to my connection with the Western and Atlantic I was freight auditor at Nashville.

Mr. Baxter: I wish you would state to the court whether the duties which you have been called upon to perform in the last 10 or 15 years have been such as to give you reasonable familiarity with freight tariffs in this part of the country?

Mr. Jackson: I think so. For several years I was claim agent for the Nashville, Chattanooga and St. Louis, and after that I was in charge of the rates for that road. I have had connection with traffic associations and have a general knowledge of rates.

Mr. Baxter: I understand that the Memphis and Charleston and the East Tennessee, Virginia and Georgia Railway Companies are in some wise connected, so that the East Tennessee, Virginia and Georgia Railway Company has a control over the Memphis and Charleston?

Mr. Jackson: My understanding is that the East Tennessee, Virginia and Georgia Railway Company leases the Memphis and Charleston.

Mr. Baxter: Is there any control or management so far as you know, joint or otherwise, between the Memphis and Charleston, or the East Tennessee, Virginia and Georgia Railway Company, and the Georgia railroad, or the South Carolina railway?

Mr. Jackson: There is none.

Mr. Baxter: With the exception, then, of the lease of the Memphis and Charleston railroad by the East Tennessee, Virginia and Georgia railroad, I understand you to say that the defendants in this case are under no common control or management?

Mr. Jackson: There is a joint management between Memphis and Atlanta—the Memphis and Charleston and the East Tennessee, Virginia and Georgia have a joint management.

Mr. Baxter: But with that exception?

Mr. Jackson: Yes, sir.

Mr. Baxter: I will ask you to state whether the defendant companies in this case have ever issued, so far as you know or believe, any joint through tariff on hay from Memphis to Summerville, S. C.?

Mr. Jackson: Not what I understand to be a joint through tariff. There is no such tariff issued.

Mr. Baxter: My friend on the other side referred to this supplement No. 7, page 15, to freight tariff No. 25 of the Memphis and Charleston railroad. Please look at that and explain to the commission how that tariff is made up?

Mr. Jackson: I do not consider this a joint through tariff. The figures shown in this tariff are arrived at by taking the joint rates and adding to those joint rates the published locals of the South Carolina railway, which I understand to be the standard rates. It is published by the Memphis and Charleston railroad.

Mr. Baxter: And as I understand the joint through rate from Memphis to Charleston on hay is what?

Mr. Jackson: Nineteen cents.

Mr. Baxter: And the local rate of the South Carolina to Summerville is what?

Mr. Jackson: It is nine cents.

Mr. Baxter: Making what?

Mr. Jackson: Twenty-eight cents.

Mr. Baxter: What rate is quoted from Memphis to Summerville on that tariff?

Mr. Jackson: Twenty-eight cents.

Mr. Baxter: Do any other roads except the Memphis and Charleston purport to join in that tariff?

Mr. Jackson: No, sir.

Mr. Baxter: That tariff is a publication by the Memphis and Charleston Railroad Company alone, on its own responsibility without consulting any of the other defendants?

53 Mr. Jackson: Yes, sir.

Mr. Baxter: And the Memphis and Charleston arrives at that by adding the through rate to the local rate?

Mr. Jackson: Yes, sir.

Mr. Baxter: And publishes it for the information of shippers?

Mr. Jackson: Yes, sir.

Mr. Baxter: What is the difference between the proportion which the roads west of Augusta receive on hay destined to Charleston and the proportion they receive on hay destined to Summerville, from Memphis?

Mr. Jackson: There is no difference.

Mr. Baxter: It is a matter of no consequence to the Georgia railroad or any road west of Augusta whether the hay stopped at Summerville or went to Charleston?

Mr. Jackson: None whatever; it makes no difference.

Mr. Baxter: What is the through rate on hay from Memphis to Augusta?

Mr. Jackson: Twenty-three cents.

Mr. Baxter: What is the South Carolina railroad's local from Augusta to Summerville?

Mr. Jackson: Fifteen cents, I think.

Mr. Baxter: Please look and see.

Mr. Jackson: The standard tariff, I see, makes it more than fifteen cents. Fifteen cents is the rate between Augusta and Summerville.

Mr. Baxter: Then, if the defendants in this case had charged the complainant the through rate from Memphis to Augusta, and then the South Carolina had charged its local from Augusta to Summerville, the rate would have been what?

Mr. Jackson: The total would have been 38 cents.

Mr. Baxter: By charging the complainant the rate to Charleston, 19 cents, plus the local from Charleston to Summerville, 9 cents, it would make 28 cents?

Mr. Jackson: Yes, sir. We use the Augusta special, which includes the transfer and which would make the rate 39 cents. The Augusta special from Memphis is 24 cents instead of 23. That is to provide for the Augusta transfer, so it would make the total 39 cents instead of 38.

Mr. Baxter: The point of my question was this: What would have been the total rate if the defendant companies had charged the through rate from Memphis to Augusta, plus the local from Augusta to Summerville, instead of charging the through rate from Memphis to Charleston plus the local from Charleston to Summerville?

Mr. Jackson: The through rate from Memphis to Augusta proper is 23 cents. The local rate of the South Carolina from Augusta to Summerville is 15 cents. That would make a through rate of 38 cents, but it would not make a delivery from the Georgia Railroad depot to the South Carolina depot.

Mr. Baxter: I do not care about the details at Augusta.

Mr. Jackson: To the complainant it would be 39 cents.

54 Mr. Baxter: The through rate to Augusta plus the local from Augusta would be 39 cents?

Mr. Jackson: Yes, sir.

Mr. Baxter: By Charleston to Summerville he gets a total rate of 28 cents?

Mr. Jackson: Yes, sir.

Mr. Baxter: So that he gets 11 cents less rate by shipping via Charleston than by shipping via Augusta?

Mr. Jackson: I said the rate was 23 cents from Memphis to Augusta; it is 22 cents. That would make the through rate 37 cents, or 38 cents including the Augusta transfer.

Mr. Baxter: This rate of 28 cents from Memphis to Summer-ville is guaranteed by whom?

Mr. Jackson: If any through rate is guaranteed, it is guaranteed by the initial line, the Memphis and Charleston.

Mr. Baxter: Are the other companies in any way bound by that guarantee?

Mr. Jackson: No, sir.

Mr. Baxter: If the Memphis and Charleston railroad sees proper to guarantee a less rate than it should, upon whom does the loss fall?

Mr. Jackson: The Memphis and Charleston railroad.

Mr. Baxter: The other lines insist upon their proper proportion?

Mr. Jackson: Yes, sir.

Mr. Baxter: And the Memphis and Charleston must make it good?

Mr. Jackson: Yes, sir.

Mr. Baxter: I would like to know what all-rail lines, if any, actually compete for traffic between Memphis and Charleston?

Mr. Jackson: Initial lines?

Mr. Baxter: Yes, sir.

Mr. Jackson: The Memphis and Charleston and its connections, the Louisville and Nashville and its connections, the Kansas City, Memphis and Birmingham, and its connections, and the Illinois Central and its connections.

Mr. Baxter: Are any one of those four initial lines at Memphis in anywise controlled or managed by the others?

Mr. Jackson: No, sir.

Mr. Baxter: You say they actually compete?

Mr. Jackson: Unless you consider that the Louisville and Nashville has some control of the Georgia railroad.

Mr. Baxter: You mentioned four initial roads and did not mention the Georgia railroad. Have any of those four initial lines any control or management over the others?

Mr. Jackson: No, sir.

Mr. Baxter: You say those four lines out of Memphis actually compete for the traffic. Do you mean they offer to compete or actually carry traffic?

Mr. Jackson: Actually carry traffic.

Mr. Baxter: They all compete at agreed rates?

55 Mr. Jackson: Yes, sir.

Mr. Baxter: How are those rates agreed upon?

Mr. Jackson: They are rates that are established or made by the rate committee of the Southern Railway and Steamship Association.

Mr. Baxter: Those four initial lines are all members of that association.

Mr. Jackson: Yes, sir.

Mr. Baxter: So the way they are agreed upon is through the representatives of those four lines on the rate committee of the Southern Railway and Steamship Association?

Mr. Jackson: Yes, sir.

Mr. Baxter: Did you get any answer to your telegram of inquiry yesterday with reference to rates that can be obtained by steamboats from Memphis to New Orleans on hay?

Mr. Jackson: No, sir; I did not.

Mr. Baxter: What charter rates can be obtained on hay from New Orleans to Charleston by ocean?

Mr. Jackson: I do not know that. I could not inform you as to the charter rates on hay. I have the charter rates on other commodities.

Mr. Northrop: I wish to say that there is no notice of any such defense in the answers, and I am unprepared on that particular matter. This is the first intimation we have had as to any competition from that direction. We are wholly unprepared on that line for the reason that the pleadings did not give notice.

Mr. Baxter: My brother is correct on that, and I will have to ask the commission to allow me to amend the answer in that regard if I can succeed in making the proof. If I find I can make the proof I will amend my answer and you shall have time to make reply. I do not think there are any vessels between New Orleans and Charleston carrying hay.

Mr. Northrop: Or grain either. We gave hay as an example.

Mr. Baxter: If I got my telegrams I would be in condition to move to amend this morning, but I got no answer. I may have to abandon the whole point, but I hope to be able to show that the rate prevailing on boats from Memphis to New Orleans, plus a rate which can be secured by chartering a vessel from New Orleans, will amount to a certain sum to Charleston. I am simply throwing it out now. Your criticism is correct.

The Chairman: A rate that can be obtained? Will that answer your purpose? Must it not be an actual competition?

Mr. Baxter: I understand your honors have gone to the length of holding that a potential competition is sufficient. I want to get the facts.

The Chairman: We want to get the facts. If there is anything they want to meet afterwards they will have an opportunity of doing it.

Mr. Baxter: I hope to be able to show the rate from Memphis to New Orleans, and then by hiring a schooner and bringing it around

I hope to be able to make that point. I will pass that for the present, considering that I have done enough in giving an intimation of what I want to do. Mr. Jackson, please state what rates have been obtained on hay from Chicago to Charleston via the lakes, canal and ocean?

Mr. Jackson: I have been shown an invoice in which a rate of 23 cents was granted from Chicago to Charleston.

Mr. Baxter: When the lakes are open so that those lake and canal rates can be used, what proportion of the traffic do the all-rail lines from Chicago to Charleston get?

Mr. Northrop: I do not like to interrupt my friend, but it seems to me we are here trying to get through in a hurry, and I object to this testimony on the ground that it is irrelevant. I am perfectly willing to admit, to save time, that different stuff can be brought from Chicago to Charleston, but the same hay and grain cannot be brought at less rates from Memphis. I submit that it is entirely irrelevant to the proceeding in that direction.

Mr. Baxter: The trouble is under the contention made in the Social Circle case by Mr. Safford; it was claimed that it is the duty of carriers when brought before the commission, to put in fully and fairly all the evidence they have to rely on, and that it is not treating the commission fairly and in good faith to hold back in our defence. If my testimony in court is thrown out because it was not introduced here, I am compelled to offer it here; and if I do not offer it here, the argument is, I cannot use it in court.

The Chairman: If you propose to offer it, it answers your purpose?

Mr. Baxter: Yes, sir.

The Chairman: Unless the commission should change its opinion on that question, if you did offer it, it would not do any good.

Mr. Baxter: I understand that.

The Chairman: Well, Mr. Baxter, go on with this witness and put in that testimony for what it is worth.

Com'r Knapp: The letter would be more satisfactory. Let us have that.

Mr. Baxter: I really supposed that the commission had all this information and that I was only calling attention to it in the course of my examination.

The Chairman: This claim has been made before. Not long ago somebody came before us from Memphis and insisted on the right to carry at almost any rate through here, because carrying could be done the other way.

Mr. Baxter: A part of this question is that it has actually been done; not that it is possible, but that it has been done.

Com'r Knapp: Your question did not go to that point.

Mr. Jackson: This invoice was not on hay, but on grain.

Com'r Knapp: I got the impression that you had seen a communication in which such a rate was proposed or guaranteed.

Mr. Jackson: The invoice I saw was on a shipment of corn from Chicago to Charleston, sold and delivered to the party at Charleston, and from the invoice was deducted a rate of 23 cents, and under the name of the concern the rate was shown, 23 cents
57. per hundred pounds, via the W. T. Company and Clyde Steamship Company.

Com'r Knapp: The Western Transportation Company?

Mr. Jackson: Yes, sir.

Com'r Knapp: We do not want to make any unnecessary trouble. It simply occurred to us that the letter would be a little more satisfactory, assuming that it was accessible.

Mr. Jackson: This was an invoice in an invoice book.

Com'r Kuapp: Perhaps he can bring it here.

Mr. Baxter: When the lakes are open, what proportion of business from Chicago to Charleston comes by water and rail lines?

Mr. Jackson: I am not able to state the proportion of business, I can only state in a general way that the business via the all-rail lines is materially affected by that movement.

Mr. Baxter: Have you joint through freight tariff, 22 G. L., issued by the Chicago and Ohio River Tariff Association, taking effect March 16, 1892?

Mr. Jackson: Yes, sir.

Mr. Baxter: I do not care to encumber the archives of the commission. I wish the stenographer to note that the defendants put in evidence page 5 of that tariff—joint through freight tariff, 22 G. L., issued by the Chicago and Ohio River Traffic Association, taking effect March 16, 1892. Please refer to page 5, Mr. Jackson, and state what the all-rail rate on class D is from Chicago via Ohio River points to Charleston.

Mr. Jackson: Thirty-three cents.

Mr. Baxter: What is the all-rail rate on 6th class, which I understand includes hay from Chicago to New York?

Mr. Jackson: Twenty-five cents.

Mr. Baxter: What is the all-rail rate from Chicago to Baltimore on the same class?

Mr. Jackson: I am informed it is 22 cents. My recollection is that there is a differential of 3 cents on the rates from Chicago to New York and the rates from Chicago to Baltimore. I am informed it is 22 cents.

Mr. Baxter: What rates are charged by schooners from Baltimore to Charleston on class D?

Mr. Jackson: Mr. Molony stated to me distinctly yesterday that he had brought in cargoes of grain from Norfolk and Baltimore by schooner at two cents per bushel—equal to about 4 cents per hundred pounds.

Mr. Baxter: If that be so, from Chicago to Charleston via Baltimore, a rate can be obtained by rail and schooner on hay of 26 cents a hundred pounds?

Mr. Jackson: Yes, sir.

Mr. Baxter: Do you know what the rail and water rate on class D is from Chicago to Baltimore?

Mr. Jackson: I am informed they have a 12-cent rate.

Mr. Baxter: By taking the rail and water rate from Chicago to Baltimore and adding the schooner rate from Baltimore to Charleston, a rate of 16 cents on hay and grain can be obtained from Chicago to Charleston?

58 Mr. Jackson: Yes, sir.

Com'r Knapp: Will you explain the route?

Mr. Jackson: I have not a map and cannot explain the route it would take.

Mr. Baxter: I understand they use the lakes to a certain point and then rail to Baltimore.

Mr. Jackson: Yes, sir: I think that is the way.

Mr. Baxter: What is the price of hay in New York as compared with the price of hay in Memphis?

Mr. Jackson: Free on board in New York, or delivered in Charleston?

Mr. Baxter: I mean in New York.

Mr. Jackson: I get the price of hay in New York on a given date at fifteen dollars per ton; on the same date it is twelve dollars and seventy cents at Memphis.

Mr. Baxter: Give the rate from New York to Charleston via the Clyde steamship line on hay and the rate from Memphis to Charleston via defendants' lines.

Mr. Jackson: The rate from New York to Charleston via the Clyde Steamship line is \$1.60 a ton, and the rate from Memphis to Charleston via defendants' lines is \$3.80.

Mr. Baxter: If I understand your answers correctly, a merchant at Charleston can buy hay at New York and pay freight from there to Charleston and it will cost him here in Charleston \$16.60 per ton?

Mr. Jackson: Yes, sir.

Mr. Baxter: Or he can go to Memphis and pay defendants' rates and it will cost \$16.50 per ton?

Mr. Jackson: Yes, sir.

Mr. Baxter: I wish you would look at Louisville and Nashville southeastern freight tariff No. 25 S. E., taking effect August 16, 1892. I wish to put in evidence pages 2, 14, and 24 of that tariff. The tariff itself is on file with the commission and I simply call attention to the pages on which we rely as matters of evidence, constituting the rates on hay to Charleston from St. Louis, East St. Louis, Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, and Memphis, as shown by that tariff.

Mr. Jackson: From Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, and Paducah, 23 cents; from St. Louis and East St. Louis, 28 cents; from Memphis, 19 cents.

Mr. Baxter: I wish also to put in evidence N. C. & St. L. southeastern freight tariff No. —, S. E.—I telegraphed for the number, but have not got an answer yet—taking effect on the — day of —. That also I will give you as soon as I get my telegram. I want to put in evidence page 2 of that tariff. I wish, Mr. Jackson, you would give us the rates to Charleston from Cairo, East Cairo, Belmont, and Columbus, as shown by the N. C. & St. L. tariff you have.

Mr. Jackson: It is 23 cents.

Mr. Baxter: The rates from all these points to Charleston on hay is 23 cents?

Mr. Jackson: Yes, sir.

Mr. Baxter: I see that the rates on hay to Charleston from

Chicago bear certain relations to the rates to Charleston from St. Louis, East St. Louis, Louisville, Cairo, East Cairo, Henderson, Belmont, Columbus and Memphis. Please state what would be the effect on the business of the defendant roads if that relation should be seriously disturbed.

Mr. Jackson : The business would move eastward.

Mr. Baxter : And these defendants would be deprived of the opportunity to compete for it ?

Mr. Jackson : Yes, sir.

The Chairman : What do you mean by moving eastward ?

Mr. Jackson : To the north Atlantic ports—the eastern seaports.

The Chairman : You mean the grain and hay ?

Mr. Jackson : Instead of finding its way into the southeast, it would find its way to the northeastern seaports, and come south by coastwise steamers.

Mr. Baxter : What is the distance from Memphis to Summerville, via defendants' route—I make it 750 miles.

Mr. Jackson : I think that is right.

Mr. Baxter : The rate from Memphis to Summerville, complained of in this case, is 28 cents a hundred pounds, a distance of 750 miles. I wish you would refer to the tariff of the Georgia railroad commission, known as its standard tariff, which you will find on pages 114 and 115 of the 20th Annual Report of the Georgia Railroad Commission. I assume that that report is also on file with the Interstate Commerce Commission. I desire to put in evidence those pages, without filing it, relying on the copy with the commission. Taking the scale of rates as adopted by the Georgia railroad commission, please state what would be a reasonable rate by extending their scale of rates to 750 miles—their rates, I think, stop at 460 miles—taking their plan of scaling the rates and carry it forward to 750 miles, and state what would be a reasonable rate according to that standard for 750 miles.

Mr. Jackson : Using their scale of rates up to 460 miles, and figuring on a reasonable scale to 750 miles, would reach a rate of 31 cents per hundred pounds.

Mr. Baxter : According to the standard of the Georgia railroad commission, the rate for 750 miles on hay would be 31 cents, as against 28 cents, charged by the defendants ?

Mr. Jackson : Yes, sir.

Mr. Baxter : I wish you would look at the tariff of the South Carolina railroad commission—the standard tariff—and see what a reasonable rate for 750 miles would be on the scale adopted in that tariff ?

Mr. Jackson : The South Carolina standard tariff for 350 miles is 31 cents per hundred pounds. I fail to work out the scale to 750 miles, but taking the ratio of increase as we start with the shorter line, and following that ratio in the same manner, the rates of the South Carolina commission I would say would go up to 35 or 36 cents a hundred pounds.

60 Mr. Baxter : For a distance of 350 miles the South Carolina commission allows 31 cents ?

Mr. Jackson : Yes, sir.

Mr. Baxter : I wish to put that tariff in.

Mr. Jackson : It does not bear a number.

Mr. Baxter : Does it bear a date ?

Mr. Jackson : It is in effect September 15, 1883.

Mr. Baxter : Has there been any subsequent tariff changing those rates ?

Mr. Jackson : I am informed there has been no change.

Mr. Baxter : What is the population of Summerville as ascertained by you ?

Mr. Jackson : Two thousand two hundred and nineteen.

Mr. Baxter : Is it situated on any water-course ?

Mr. Jackson : No, sir.

Mr. Baxter : What railroads center there ?

Mr. Jackson : The South Carolina.

Mr. Baxter : What is the distance from Charleston to Summerville ?

Mr. Jackson : Twenty-one miles.

Mr. Baxter : What is the distance from Augusta to Summerville ?

Mr. Jackson : One hundred and seventeen miles.

Mr. Baxter : Look at the standard tariff of the South Carolina railroad commission which you have just had before you and state what local rate is allowed by that commission on hay from Charleston to Summerville, a distance of 21 miles.

Mr. Jackson : Nine cents per hundred pounds.

Mr. Baxter : That is the rate charged in this case by these defendants ?

Mr. Jackson : Yes, sir.

Mr. Baxter : What is the distance from Augusta to Charleston via the South Carolina railroad ?

Mr. Jackson : One hundred and thirty-eight miles.

Mr. Baxter : What is the distance from Augusta to Charleston via the Port Royal and Augusta and the Charleston and Savannah railroads ?

Mr. Jackson : One hundred and forty-eight miles.

Mr. Baxter : I wish you would state to the commission whether the Port Royal and Augusta and the Charleston and Savannah Railroad Companies compete with the South Carolina for business between Augusta and Charleston.

Mr. Jackson : Yes, sir.

Mr. Baxter : And whether the Port Royal and Augusta and the Charleston and Savannah will take business coming from Memphis at Augusta and carry it from Augusta at the same proportion of the Memphis and Charleston rate as the South Carolina ?

Mr. Jackson : Yes, sir.

Mr. Baxter : There is a difference in distance of only 10 miles ?

Mr. Jackson : Yes, sir.

61 Mr. Baxter : As I understand you, the defendant railroads west of Augusta could have delivered this hay in controversy to the Port Royal and Augusta and the Charleston and Savannah roads. They would have brought it to Charleston at the same pro-

portion of the Memphis and Charleston rate as the South Carolina charged, which would put it here at 19 cents, and then complainant would have to ship from Charleston to Summerville by the South Carolina railroad at the local rate of 9 cents; so he would have to pay 28 cents if it was shipped by the Port Royal and Augusta and Charleston and Savannah roads around by Charleston?

Mr. Jackson: Yes, sir, they would be very glad to take the business.

Mr. Baxter: That is all.

Cross-examination:

Mr. Northrop: I move to strike out the testimony of Mr. Jackson as to Baltimore and Chicago rates, on the ground that they are hearsay. Mr. Jackson, your road receives through traffic, class D from the East Tennessee, Virginia and Georgia railway from Memphis and carries it over your road and delivers to the South Carolina railway, does it not?

Mr. Jackson: Yes, sir.

Mr. Northrop: Do you know whether there is any actual competition in existence by water for freight originating at Memphis, by carrying it down the Mississippi river to New Orleans and then by water from New Orleans to Charleston?

Mr. Baxter: I wish to put in an objection, because I submit that the meaning of the term "actual competition" is a question of law that the witness cannot swear to. On briefs we expect to discuss that question, and I would like my friend to get at the facts.

Mr. Northrop: I supposed it was a matter of fact.

The Chairman: Ask if anything is carried that way.

Mr. Northrop: Are there any shippers taking grain or hay from Memphis to New Orleans and carrying it from New Orleans by water to Charleston; if so mention the lines and shippers.

Mr. Jackson: I do not know of any actual movement.

Mr. Northrop: I might put the same question. Do you know of any actual shippers or purchasers who convey freight of this class D through from Chicago over the lakes and canals and down by the sea to Charleston?

Mr. Jackson: Not of my own knowledge.

Mr. Northrop: You have not heard of any considerable movement of grain or hay to Charleston that way?

Mr. Jackson: Yes, sir.

Mr. Northrop: Large shipments?

Mr. Jackson: Yes, sir; I was informed by a heavy grain dealer in Charleston that over a year ago there were more than 1,100 cars of grain, flour and hay.

Mr. Northrop: Do you know of any such shipments in existence at present?

Mr. Jackson: No, I do not know of any just now.

62 Mr. Northrop: Then, there is no large movement or any movement of considerable extent of grain and hay from Chicago via the lakes and by sea to Charleston now?

Mr. Jackson: I do not know of any at the present time.

Mr. Northrop: You have made it a subject of inquiry?

Mr. Jackson: Yes, sir; I do not suppose there is any movement just now.

Mr. Northrop: So you do not think there is any actual competition by water from Chicago to Charleston?

Mr. Jackson: I do not understand that movement is necessary to produce competition. The existence of the rate produces it.

Mr. Northrop: There cannot be any competition unless the stuff is carried. All these four competing railroads are subject to the provisions of the act to regulate commerce, are they not? They carry the traffic between different States?

Mr. Jackson: Oh, yes, sir.

Mr. Northrop: All belong to the Southern Railway & Steamship Association?

Mr. Jackson: Yes, sir.

Mr. Northrop: There is no competition among those roads; all have the same rates?

Mr. Jackson: All those initial lines work the same rates between the same points.

Mr. Northrop: There is no cutting of rates between them?

Mr. Jackson: I do not know.

Mr. Northrop: Is not this grain and hay that comes from New York, for instance, raised in the West and then brought to New York for shipment by sea, most of it?

Mr. Jackson: You mean the hay and grain that comes into this territory?

Mr. Northrop: Yes, sir.

Mr. Jackson: Yes, sir; I will say that the grain was raised in the western grain places.

Mr. Northrop: Do you know of any existing steamship lines or other water carriers from Baltimore to Charleston, conveying this grain in large quantities or to any considerable extent?

Mr. Jackson: No, sir, I am not personally familiar with the lines in the grain business.

Mr. Northrop: You do not know of any?

Mr. Jackson: No, sir.

Mr. Northrop: You have made inquiry?

Mr. Jackson: Yes, sir, I have made inquiry.

Mr. Northrop: That is all.

Redirect examination:

Mr. Baxter: You say this hay that comes to Charleston, whether it comes via Ohio River points or via New York, is raised in the grain belt of the West.

Mr. Jackson: I understood the gentleman to ask in reference to grain.

Mr. Baxter: How in reference to hay?

63 Mr. Jackson: I do not know. I understand there is a good deal of hay brought to New York from eastern points. There is some eastern hay.

Mr. Baxter : Where is the hay grown that comes from Memphis ?

Mr. Jackson : It is western hay, most of it. It is grown in Illinois, Missouri, and Missouri River territory.

Mr. Baxter : Is it not a fact that the competition in the carriage of that hay really starts on the farm where the hay is raised ?

Mr. Jackson : Yes, sir.

Mr. Baxter : Some lines via Ohio river, and others via Chicago ?

Mr. Jackson : Yes, sir.

Mr. Baxter : I will suggest to my brother on the other side, as he makes certain objections to my testimony as hearsay, that if he will be kind enough to give me a memorandum today some time, or write me after looking over the testimony, I will take the testimony, if I can procure it, that will be original so as to put the facts before the commission in legal form.

Mr. Northrop : All right, sir.

Com'r Knapp : The route over which it goes, that traffic passes through Summerville ?

Mr. Jackson : It can, but not necessarily.

Com'r Knapp : The joint tariffs indicate movement of traffic by a certain route ?

Mr. Jackson : The tariffs do not indicate a movement by any specific routes. There are certain rates effective between Memphis and Charleston, open to all lines.

Com'r Knapp : As a matter of fact, does the traffic coming from Memphis to Charleston pass through Summerville ?

Mr. Jackson : Some does, and some does not.

Com'r Knapp : All hauled by this line ?

Mr. Jackson : By the South Carolina ?

Com'r Knapp : Yes, sir.

Mr. Jackson : It can reach Summerville without going over the South Carolina. We can give it to the Port Royal and Augusta and they can bring it to Charleston over the Charleston and Savannah.

The Chairman : Does your road make one of the roads that makes a line over which freight passes from Memphis to Charleston ?

Mr. Jackson : It is one of the lines.

The Chairman : What are the other roads in the line of which yours is a part of the through line ?

Mr. Jackson : We are a part, or can be made a part of the line on business originating with any of the initial lines.

The Chairman : You habitually carry through freight from Memphis to Charleston ?

Mr. Jackson : Yes, sir.

The Chairman : Over several initial roads ?

Mr. Jackson : Yes, sir.

The Chairman : Is the Memphis and Charleston one of them ?

Mr. Jackson : Yes, sir.

64 The Chairman : Your road is the next then to the Memphis and Charleston ?

Mr. Jackson : There is the Memphis and Charleston, the East Tennessee, Virginia and Georgia, and then the Georgia. Business

moves frequently out of Memphis over the Memphis and Charleston, and then over the Western and Atlantic.

The Chairman : I want the usual route when it passes over your line ?

Mr. Jackson : The Memphis and Charleston, the East Tennessee, Virginia and Georgia, the Georgia and the South Carolina.

The Chairman : That passes through Summerville ?

Mr. Jackson : Yes, sir.

The Chairman : And you habitually participate in the carriage of freight over that route ?

Mr. Jackson : Yes, sir.

The Chairman : And when you do, you divide this 19-cent rate ?

Mr. Jackson : A proportion of it ; yes, sir.

The Chairman : And that part of the 19-cent rate to Charleston is less than your local rate of your road ?

Mr. Jackson : Yes, sir.

The Chairman : And you carry that way on through bills, from Memphis to Charleston ?

Mr. Jackson : Yes, sir.

The Chairman : Do you also carry to Summerville ?

Mr. Jackson : Yes, sir.

The Chairman : The rate is made up in a different way ?

Mr. Jackson : Yes, sir.

Commissioner Knapp : Is there considerable movement of hay and grain from Memphis to Charleston ?

Mr. Jackson : Very considerable ; yes, sir.

Commissioner Knapp : Can you give any idea of the amount during any given period of time ?

Mr. Jackson : No, sir ; no definite idea.

Commissioner Knapp : More or less of that traffic is moving all the time.

Mr. Jackson : Yes, sir.

Commissioner Knapp : Does some of it come by way of Birmingham or other points not through Chattanooga ?

Mr. Jackson : Yes, sir.

Commissioner Knapp : On hay to Summerville do you get more as your proportion than on shipments to Charleston ?

Mr. Jackson : No, sir ; the lines west of Augusta do not participate in the local rate of 9 cents.

Commissioner Knapp : That is all.

The Chairman : Mr. Baxter, this is nearly the Social case over again ?

Mr. Baxter : Yes, sir.

The Chairman : Now, what about Mr. Molony ?

Mr. Northrop : He does not seem to be in his office. I think he must be around town somewhere collecting. I merely wanted to ask him if he knows of any of these shipments coming in here by water, so that if the case comes up before another tribunal we will be safe.

The Chairman : We might just as well be informed about that

here—whether or not there is any such traffic coming in through here.

Mr. Northrop: Yes, sir. We want to prove that it is, or is not the fact. Mr. Molony would be a very likely man to know what is actually done in the shipment of grain, being engaged in that business.

The Chairman: Any man engaged in the business would be likely to know how these shipments were made here and if any are made by water, under what conditions, etc., and inform us as to the actual facts.

Mr. Baxter: Mr. Waring, who is connected with the South Carolina railway, is here, and it might save time to hear his testimony while waiting for the other gentlemen.

The Chairman: Yes, sir.

Mr. Baxter: Mr. Waring, please take the stand.

E. P. WARING, a witness on behalf of defendants, being duly sworn, testified as follows:

Mr. Baxter: May it please the commission, I have submitted some questions to Mr. Waring, and he has written out his answers. If the commission will permit that process of examination and allow Mr. Waring to read the questions and answers, it will save time, and the gentleman on the other side can cross-examine him if he wishes.

(No objection.)

(Mr. Waring read questions and answers referred to; the same marked Exhibit 1.) As follows:

"Question No. 1. On classes 'C,' 'D' and 'F' from Memphis is the full South Carolina railway local rate added to the through rate, from Memphis to Augusta, on business to Summerville, S. C.?

"Answer. The full local rate of the South Carolina railway is added to the through rate, Memphis to Charleston, to make rate, Memphis to Summerville, S. C.

"Question No. 2. What is the through rate from Memphis to Augusta, Ga., on business to Summerville, S. C., or what is the through rate, Memphis to Augusta, and what is the full South Carolina railway local rate from Augusta to Summerville?

"Answer. C.—27c., D.—23c., F.—47c.—Through rate, Memphis to Augusta for points beyond. Augusta to Summerville—C.—18c., D.—15c., F.—36c.

"Question No. 3. What is the through rate Memphis to Charleston, and what is the South Carolina railway full local Charleston to Summerville on these classes?

"Answer. Through rate Memphis to Charleston, S. C., C. 23c.; D. 19c.; F. 18c. Locals Charleston to Summerville, S. C., C. 9c.; D. 9c.; F. 18c.

66 "Question No. 4. Is the nine cents charged from Charleston to Summerville, S. C., the authorized local of the commissioner?

"Answer. Yes.

"Question No. 5. I want the bill of lading on which this hay for Behlmer was handled, Memphis to Summerville, S. C.

"Answer. Bill of lading attached (to Exhibit 1).

"Question No. 6. Ascertain from the car record office if the car of hay in question did arrive at Summerville on August 17, 1892?

"Answer. M. P. car 7852 reached Summerville August 17th, 1892.

"Question No. 7. Did the roads west of Augusta get a larger portion of the through rate on the hay to Summerville than they would on hay to Charleston?

"Answer. Roads west of Augusta received the same on the through rate to Summerville as they received on the through rate to Charleston, S. C.

"Question No. 8. What would be the portion of each road, Memphis to Charleston?

"Answer. M. & C., 7.2 per 100 pounds; E. T., V. & G. R. R. or W. & A. R. R., 3.2 per 100 pounds; Ga. R. R., 3.9 per 100 pounds. Transfer, 1.5 per 100 pounds; S. C. R'y, 3.2 per 100 pounds.

"Question No. 9. What would be the rate, Memphis to Summerville, via the route that this hay was handled?

"Answer. 28 cents per 100 pounds.

"Question No. 10. What is the rate on grain and hay from Chicago via the Erie canal and New York to Charleston?

"Answer. Have no knowledge.

"Question No. 11. What is the rate on this class of freight from Boston to Charleston?

"Answer. 20 cents per 100 pounds.

"Question No. 12. From New York to Charleston?

"Answer. 14 cents per 100 pounds.

"Question No. 13. From Philadelphia to Charleston?

"Answer. 14 cents per 100 pounds.

"Question No. 14. From Baltimore to Charleston?

"Answer. No steamer line from Baltimore to Charleston. Rail and water rate via Virginia ports 17 cents per 100 pounds.

"Question No. 15. What was the rate per ton per mile on the carload in question; in other words, how many tons of hay was in the car, and what was the gross freight, and what was the amount per ton per mile earned by each road handling the hay?

"Answer. Ten tons. Gross freight, \$56.00; divided M. & C. \$14.40, E. T., V. & G. R. R. \$6.40, Ga. R. R. \$7.80, transfer \$3.00, S. C. \$24.40. The lines hauling earned per ton per mile as follows:

"M. & C. R. R. 4.6 tenths mills per ton per mile; E. T., V. & G. R. R. 4.6 tenths mills per ton per mile; Ga. R. R. 4.6 tenths mills per ton per mile. Transfer, arbitrary; S. C. R'y 2.1 tenths cents per ton per mile.

"Question 16. How much less is the rate or portion of rate on hay, Memphis to Charleston to Summerville, than the South Carolina railway received than the authorized local rate on hay from Augusta to Summerville?

"Answer. Local rate, Augusta to Summerville, class 'D,' 15 cents

per 100 pounds. S. C. R'y received 12.2 tenths cents per 100 pounds, or 2.8 tenths cents per 100 pounds less the local."

Mr. Baxter: You stated that the rate on this class of freight from New York and Philadelphia to Charleston is 14 cents per 100 pounds. Please look at this tariff of the Clyde Steamship Company, which I offer in evidence, and state whether or not those rates are not obtained from that tariff?

Mr. Waring: Yes, sir; I presume they are.

Mr. Baxter: I will ask you if schooner rates cannot be obtained from those points to Charleston much below Clyde rates?

Mr. Waring: I certainly think they can.

Mr. Baxter: I will ask you if those are not the rates from New York proper, and if the Clyde Steamship Company will not give much lower rates to Charleston from New York on business that originates in Chicago and the West?

Mr. Waring: I think they would, sir.

Mr. Baxter: A year ago were not large quantities of this freight brought here from eastern ports so as to substantially supply the Charleston market—by vessel?

Mr. Waring: I think there was, but I am unprepared to say as to the extent. There was quite an amount, not only a year ago, but some time previous to that. Sometimes cargoes of corn have been brought in here not only from eastern ports, but from Virginia ports.

Mr. Baxter: Hay takes the same rate as corn, does it not?

Mr. Waring: Yes, sir.

Mr. Baxter: The effect of that traffic being brought in here by vessel—what effect would that have upon traffic from Ohio and Mississippi River points?

Mr. Waring: It would relieve the rail lines of the haul to this port.

Mr. Baxter: That is all.

Cross-examination:

Mr. Northrop: From what eastern and Atlantic ports does this corn come?

Mr. Waring: New York, Baltimore, and perhaps Philadelphia.

Mr. Northrop: How can it get to Baltimore, New York, and Philadelphia from the West?

Mr. Waring: I suppose over the canal and lake routes.

Mr. Northrop: Does it come by rail?

Mr. Waring: Yes, sir; in some measure—conjoined line of rail and water—lake and rail.

Mr. Northrop: If it comes by water where does it originate?

Mr. Waring: I don't know that I could say exactly. I suppose in Illinois and Missouri and that vicinity.

Mr. Northrop: What other points could it originate at where it could come by water?

68 Mr. Waring: Almost any lake point and a great many river points.

Mr. Northrop: Is it not a fact that most of the grain that comes by lakes starts from Chicago?

Mr. Waring: I don't think I could answer that question correctly.

Mr. Northrop: If it comes from Mississippi River points on east side does it not come by rail to the seaboard?

Mr. Waring: Some proportion does.

Mr. Northrop: Are the rates from the east side of the Mississippi to the seaboard over the northern roads as great, or are they not greater than the rates from Memphis to the seaboard—to Charleston?

Mr. Waring: I cannot say positively; perhaps to certain points.

Mr. Northrop: Are not the distances greater?

Mr. Waring: Yes, sir.

Mr. Northrop: What is the distance between Chicago and New York?

Mr. Waring: I have not the figures; I don't know, sir.

Mr. Northrop: You don't know the distance from the Mississippi river, or from any Mississippi River points, to the seaboard?

Mr. Waring: I have not the figures with me.

Mr. Northrop: Is there any actual grain coming in here now by way of water from Chicago in large quantities?

Mr. Waring: I don't think so.

Mr. Northrop: Why does it not come?

Mr. Waring: I suppose for one reason, that there is not a large amount of grain coming from any point at present.

Mr. Northrop: Does it come?

Mr. Waring: It may not come because the rate is not in favor of that route now. Judging from the evidence of Mr. Jackson this morning I would say that the rates are in favor of that route.

Mr. Northrop: Does it come? Would you not know?

Mr. Waring: I am not supposed to know what the traffic by the Clyde Steamship Company is.

Mr. Northrop: You do not know whether there is any handled by water to Charleston?

Mr. Waring: I could not answer that positively. There is from time to time an amount of baled hay and grain via Clyde steamship line from New York to Charleston, but as to the origin of that grain I don't know.

Mr. Northrop: Is that very large?

Mr. Waring: No, sir; very small.

Mr. Northrop: Don't you receive and deliver through traffic originating at Memphis, Tennessee, from the Georgia road, and deliver over your line to various points on through bills of lading?

Mr. Waring: Yes, sir.

Mr. Northrop: Don't you receive stuff originating at Memphis on through bills of lading for Summerville?

Mr. Waring: Yes, sir.

Mr. Northrop: That is all.

69 Mr. Northrop: Have you any objection to Mr. Kracke taking the stand, Mr. Baxter?

Mr. Baxter: No, sir.

F. D. C. KRACKE, JR., a witness on behalf of complainants, being duly sworn, testified as follows:

Direct examination:

Mr. Northrop: Mr. Kracke, will you state to the commission whether the majority of the grain gets to Charleston by rail or water?

Mr. Kracke: It differs at times. It depends upon the prices of grain at Chicago and other points; it is sometimes higher at Chicago, and sometimes lower. It is too high for us now.

Mr. Northrop: How does it reach here now, all rail?

Mr. Kracke: All rail, yes, sir.

Mr. Northrop: You deal in grain to a very large extent, do you not, Mr. Kracke?

Mr. Kracke: I handle a fair quantity, yes, sir.

Mr. Northrop: How many car-loads a year do you handle?

Mr. Kracke: I cannot say exactly.

Mr. Northrop: About how many?

Mr. Kracke: I really don't know. In fact, I do not want to give the particulars of my business away. I think that is going too far.

Mr. Northrop: You are a large dealer?

Mr. Kracke: Yes, sir, in proportion to the amount of grain sold here.

Mr. Northrop: Coming from Chicago does it come by water?

Mr. Kracke: Sometimes it comes by rail; mostly by water and rail.

Mr. Northrop: What do you mean by water and rail?

Mr. Kracke: By lake and rail; part water and part rail.

Mr. Northrop: Is there any amount of that now?

Mr. Kracke: No, the rates are too high.

Mr. Northrop: When it comes from Memphis can it get here by water at all?

Mr. Kracke: No, sir, but I suppose it is possible.

Mr. Northrop: Does it?

Mr. Kracke: No, sir.

Mr. Northrop: Did you ever hear of any coming by the Mississippi river, Mr. Kracke?

Mr. Kracke: No, sir.

Mr. Northrop: How long have you been in business?

Mr. Kracke: 30 years.

Mr. Northrop: Did you ever have any shipment that way?

Mr. Kracke: No, sir.

Mr. Northrop: So any grain originating at Memphis comes here all rail?

Mr. Kracke: Yes, sir.

Mr. Northrop: That market is better than Chicago for prices?
70 You can buy cheaper in Memphis and sell here than in Chicago—than by getting it from Chicago by water?

Mr. Kracke: Yes, sir.

Mr. Northrop: Mr. Kracke, do you know how far Memphis is from Chicago?

Mr. Kracke: No, sir.

Mr. Northrop: That is all.

Cross-examination:

Mr. Baxter: What is the price of hay in Chicago?

Mr. Kracke: I really don't know; I have not sold a bale of hay in that country for a long time.

Mr. Baxter: You don't keep up with the daily quotations?

Mr. Kracke: Yes, sir, I get them from different points.

Mr. Baxter: In what section of the country is the hay raised that comes here from Memphis?

Mr. Kracke: All through Missouri, sir, Kansas and that vicinity.

Mr. Baxter: Mr. Kracke, take the section of country where that hay is raised; what is the railroad distance from that point to Chicago? How much farther would the farmer have to send his hay, from the section where this hay is raised, by Chicago than by Memphis?

Mr. Kracke: I do not know, sir.

Mr. Baxter: Don't you know of shipments of grain from Chicago via the lakes and canals to New York, and thence by steamer or vessel to Charleston?

Mr. Kracke: I have heard them, sir; I think about four years ago. The prices in Chicago do not justify that now. They are too high in Chicago now.

Mr. Baxter: What were the rates obtained by that route when you were shipping that way? Can you state from recollection what those rates were?

Mr. Kracke: I do not recollect; it is too long ago.

Mr. Baxter: Don't your hay cost about the same to deliver it here now?

Mr. Kracke: I think about the same; perhaps a little less.

Mr. Baxter: Mr. Kracke, do you know the rate from Memphis to New Orleans on class D?

Mr. Kracke: No, sir.

Mr. Baxter: Do you know whether or not a lower rate can be obtained by Mississippi river to New Orleans and by chartered steamer from New Orleans?

Mr. Kracke: I don't think it can be done, sir.

Mr. Northrop: Does much hay come from Maine and New York?

Mr. Kracke: Yes, sir, sometimes.

Mr. Baxter: I am requested to ask you if last winter there were not some cargoes of grain brought in here from Virginia ports?

Mr. Kracke: I think last summer one or two cargoes were brought here.

71 Mr. Baxter: From what points?

Mr. Kracke: I think from Norfolk.

Mr. Baxter: Did that originate there, or where was it grown?

Mr. Kracke: Up in that vicinity, I suppose.

The Chairman: Where did you say?

Mr. Kracke: Norfolk, Virginia.

Mr. Baxter: Was that not brought here at a cost here that ena-

bled those gentlemen who brought it here to undersell those bringing it from the West?

Mr. Kracke: Yes, sir,

Mr. Baxter: Now, suppose these defendant roads in this case operating from Ohio River points to Charleston, should raise the rates from those points to Charleston materially above what they are now, on class D, would it not have the effect of bringing large quantities by that route?

Mr. Kracke: Yes, sir; I think it would perhaps.

Mr. Baxter: Have you ever shipped any by that route—around by New York?

Mr. Kracke: Yes, sir, I have had some by New York from Chicago.

Mr. Baxter: That is all I wish to ask.

Redirect examination:

Mr. Northrop: Does very much of this Virginia grain come to this market, Mr. Kracke?

Mr. Kracke: Not very much; sometimes large volumes come from the West.

Mr. Northrop: Maine and Virginia do not play a very large part, do they?

Mr. Kracke: No, sir.

Mr. Northrop: That is all.

The Chairman: We have not heard from Mr. Molony yet.

Mr. Northrop: No, sir; he must be around town on business somewhere.

The Chairman: Are there other witnesses?

Mr. Baxter: Yes, sir; Mr. Ward.

C. M. WARD, a witness on behalf of defendants, being duly sworn, testified as follows:

Mr. Baxter: Which one of these defendant companies are you connected with, Mr. Ward?

Mr. Ward: I am general manager of the South Carolina railway.

Mr. Baxter: State to the commission what would be the effect on revenue to your road if you were compelled to reduce all of your local rates to the proportion that your company receives on through rates?

Mr. Ward: It would very nearly ruin the South Carolina railway. If the rates were brought down to meet the Charleston rate, which we are obliged to apply and use here—if they were brought down to meet the Charleston rate, which is made to meet the water rates—it would reduce every local rate on our road to that proportion to come within the long and short haul clause, and it would tremendously reduce the revenue of the South Carolina railway. They are hardly making enough to run them now, and if that new system of rates went into effect it would practically ruin us.

Mr. Baxter: Do you know what you reported to the Interstate Commerce Commission as the cost per ton per mile for moving freight?

Mr. Ward: Yes, sir; I have it here. It is 1.46 cents per ton per mile. Did you ask me the cost, or earnings?

Mr. Baxter: The cost.

Mr. Ward: The cost is 7.38 mills per ton per mile on all classes of freight. I have a copy here of our report to the Interstate Commerce Commission for the year ending June 30th, 1892. That shows the average cost of hauling all kinds of freight per ton per mile.

Mr. Baxter: That is all classes of freight?

Mr. Ward: Yes, sir. The cost of hauling all kinds.

Mr. Baxter: What is the average capacity of your freight trains; how many cars can an engine pull from Augusta here?

Mr. Ward: We can haul about 35 cars—33 to 35.

Mr. Baxter: Now, suppose you had a train of 33 cars at Augusta destined for Charleston, and you were offered these two cars of hay to be brought on that train, could you not draw those two cars with the other 33, and could you not afford to take them at a less rate per ton per mile than you could all your traffic?

Mr. Ward: How is that?

Mr. Baxter: You say your engines can pull 35 cars from Augusta here. You have reported to the Interstate Commerce Commission that the average cost of all freight is a certain sum per ton per mile. Suppose instead of having a full loaded train of 35 cars you only had 33, but you wanted two more to fill out your train, could you not afford to take those two cars for a less rate per ton per mile than the average rate?

Mr. Ward: Yes, sir.

Mr. Baxter: Then the cost of moving those additional cars would be very much less than the average cost of cars?

Mr. Ward: Yes, sir.

Mr. Baxter: How much do you get out of this traffic in controversy? I think you reported here that you got your per cent. of 3.2 cents per 100 pounds?

Mr. Ward: Yes, sir.

Mr. Baxter: Your average cost is 7.38 mills?

Mr. Ward: Yes, sir.

Mr. Baxter: Your proportion of the through rate is what?

Mr. Ward: I don't recollect that.

Mr. Baxter: Are you prepared to figure out how many mills per ton per mile your proportion of through rate is, Memphis to Charleston?

Mr. Ward: It would be 4.6 mills per ton per mile; 138 miles.
73 Commissioner Knapp: Then the rate you are charging on that is not less than it costs you to haul it on that through rate?

Mr. Ward: No, sir.

The Chairman: You don't carry through at 6th class; that 19-cents rate is not sixth-class rate, Memphis to Charleston?

Mr. Ward : It is class D.

Mr. Baxter : It is the official sixth class, but the Southern Railway and Steamship Association, class D.

The Chairman : That class, grain and hay, is a very low grade freight and carried at comparatively cheap rates?

Mr. Ward : Yes, sir, it has to be.

The Chairman : You reported that the average cost per ton per mile on all your business is 7.38 mills?

Mr. Ward : Yes, sir.

The Chairman : Then on grain and hay it would be very much less than that, would it not?

Mr. Ward : You mean the cost of haul?

The Chairman : Yes, sir.

Mr. Ward : I would like to make a statement, Mr. Commissioner, that that report we make to you in accordance with the forms is very erroneous and leads to wrong conclusions entirely. It is made up on a wrong basis; for instance, it is made up on a basis of train mileage. The mileage of passenger trains is greater than that of freight trains. It is ridiculous to come down to look at it from a business standpoint. It shows that our passenger business is away over in debt and that we are making an immense profit out of our freight business, when we are barely making a living out of it.

Commissioner Knapp : Mr. Ward, that arises from the fact that you are making more money out of freight than passenger business, does it not?

Mr. Ward : No, sir. Our freight is so light in summer time that passenger-train mileage is in excess of freight. These reports are made up on that basis.

The Chairman : Make it on your own basis or on any basis known to those who manage transportation of hay and grain and this class D of articles of freight. Is it not moved and handled and transported at very much less per ton per mile than the general average of freight?

Mr. Ward : Our general average of freight is that class of business. Three-fourths of our business is made up of that class of freight. It would cost very much less than strawberries or any class of vegetables, because we don't load that hay at all; we don't load or unload it.

The Chairman : Take the general average.

Mr. Ward : Well, three-fourths of our business is that kind of freight. I think that that would be the average freight. I can tell you what an immense tonnage of hay we haul. We haul 9,600,000 pounds of hay. So you see it is quite an item in our business.

The Chairman : What do you carry in considerable quantities that is less than that—that costs less to handle?

74 Mr. Ward : Well, I don't know. We handle a great deal of rock going out here on the jetties. I think that costs a little more to handle. Fertilizers go at lower rates. You can get a better rate on that than on hay, there are a few more tons in a car; I think the expense would be about the same though. There are more tons in a car, and consequently more revenue. Hay or

any of that western produce is about what our average freight is, and the expense and profits on that would be about the average expense and average profit.

The Chairman : If that is your opinion, we will take it as such.

Commissioner Knapp : A large proportion of your business is bringing this hay and grain from the West ?

Mr. Ward : Nearly all of our east-bound business is that.

Commissioner Knapp : Can you give us some idea of the manner in which that traffic is divided as between Charleston and other points which get the 19-cent rate and the interior points which have a higher rate ?

Mr. Ward : Our business to Charleston proper is considerably larger than our business to local stations.

Commissioner Knapp : Do you mean that it is larger than the aggregate ?

Mr. Ward : Yes, sir, than all of our local stations.

Mr. Northrop : Mr. Ward, does this stuff go back over your road to be distributed in the interior ?

Mr. Ward : A very small proportion.

Mr. Northrop : Where does that stuff go that you bring here ?

Mr. Ward : It stays right here ; consumed right here, Charleston and neighborhood. If there was a dealer who wanted to send a car-load to Orangeburg, he would send it to Orangeburg direct. A station of any size on our road would be direct. It would not come to Charleston.

Mr. Northrop : Can you give us the rate per ton per mile, that is, the cost per ton per mile on this traffic ; can you take that out ?

Mr. Ward : No, sir, I cannot do that.

Mr. Northrop : Can you give us the profit on this particular stuff ?

Mr. Ward : No, sir. The gross earnings on all freight is about 7 mills.

Mr. Northrop : That is all ; no further questions.

H. A. MOLONY, a witness on behalf of the defendant-, having been duly sworn, testified as follows :

Mr. Baxter : What is your business ?

Mr. Molony : I am in the hay and grain business.

Mr. Baxter : Here in Charleston ?

Mr. Molony : Yes, sir.

Mr. Baxter : I will ask you, Mr. Molony, if you have ever brought any hay from Chicago via the lakes, canal and ocean, and, if so, what rate you paid ?

Mr. Molony : I have had hay brought rail and lake from Chicago.

75 Mr. Baxter : At what rates ?

Mr. Molony : I cannot give the rates on hay, but I can on grain. I think there is a differential on hay of 2 or 3 cents. I am not positive, but I think there is.

Mr. Baxter : What is the rate on grain ?

Mr. Molony : Twenty-three cents.

Mr. Baxter: That includes all the way from Chicago?

Mr. Molony: Yes, sir.

Mr. Baxter: A differential of 3 cents would make 26 cents on hay?

Mr. Molony: Yes, sir.

Mr. Baxter: How long has it been since you bought any?

Mr. Molony: About 16 months.

Mr. Baxter: What rate can you obtain on hay from Norfolk and Baltimore to Charleston?

Mr. Molony: I can get a rate from New York—I do not get much hay from Baltimore—I can get a rate from New York of \$1.60 per ton, 8 cents per hundred.

Mr. Baxter: Have you ever known what the charter rates would be—what it would cost to charter a vessel from New Orleans to Charleston to bring any kind of freight, hay or anything else around that way?

Mr. Molony: I never figured it myself, but I have heard from other people who wanted to bring oats from Galveston and New Orleans that they could make a rate of from four to six cents a bushel.

Mr. Baxter: How much is that per 100 pounds?

Mr. Molony: About 18 or 20 cents.

Mr. Baxter: Do you know the rate on steamed oats from Memphis to New Orleans?

Mr. Molony: No, sir; I do not. I never figured that.

Mr. Baxter: Do they not sometimes bring sugar and molasses that way?

Mr. Molony: Yes, sir.

Mr. Baxter: Do you know what they charge per ton for that service?

Mr. Molony: No, sir, I could not tell exactly.

Mr. Baxter: The rates on sugar and molasses and hay and grain bear a relation on the tariffs?

Mr. Molony: Yes, sir.

Mr. Baxter: If we could get the rates on sugar and molasses, we could figure them on hay and grain?

Mr. Molony: I think so.

Cross-examination:

Mr. Northrop: Does any hay or grain come from Memphis to Charleston by water?

Mr. Molony: Not that I know of.

Mr. Northrop: You never heard of any?

Mr. Molony: None.

76 Mr. Northrop: There is no existing line of ships carrying grain and hay from Memphis to Charleston via New Orleans now?

Mr. Molony: No, sir.

Mr. Northrop: How long have you been in business?

Mr. Molony: Seven years.

Mr. Northrop: You never heard of hay or grain coming to Charleston that way?

Mr. Molony: No, sir.

Com'r Clements: The shipment of corn a year and a half ago on which you paid 23 cents, what route did that come over?

Mr. Molony: Rail and lake to Buffalo, canal from there, and steamer down from New York.

Com'r Clements: You paid the freight here?

Mr. Molony: Yes, sir.

Com'r Clements: What line brought it—the Clyde steamship line?

Mr. Molony: I think so; yes, sir.

The Chairman: How many persons beside yourself are in the same business in Charleston that do considerable business in your line?

Mr. Molony: There are five.

The Chairman: Where do you habitually get your grain and hay?

Mr. Molony: Principally West. We have bought considerable grain East in this last two years on this difference of rate, and then prices West have been a little out of line in comparison with the prices when we buy East and bring it down by water.

The Chairman: Does it habitually occur that you buy East?

Mr. Molony: We generally buy West.

The Chairman: You bought once in the last year and a half East?

Mr. Molony: I bought more than once. The corn I bought a year and a half ago—I think it was in the latter part of August. I bought it in Chicago. It came by rail, lake and steamer.

The Chairman: Was that a tariff rate?

Mr. Molony: It was a current rate at that time to all shippers from Chicago.

Com'r Knapp: Suppose you had to pay 25 cents, hay and grain from Memphis, would it stop coming that way?

Mr. Molony: Yes, sir.

Com'r Knapp: You would get it by New York or some Atlantic port?

Mr. Molony: Yes, sir.

Com'r Knapp: At a 19-cent rate you get most by all rail from the West?

Mr. Molony: We can figure it this way on a 19-cent rate: Hay in Memphis would be about \$12.75. I can buy the same grade of hay in New York for \$15. At a rate of \$1.60 it would make it pretty much the same cost. If they raise the rate of 19 cents from Memphis, we would naturally buy all the hay East.

77 The Chairman: So that if the prices raised one way and did not the other, you would change your mode of business?

Mr. Molony: Certainly; we would have to do it.

The Chairman: You would go where you found the best market?

Mr. Molony: We would try to.

The Chairman: And it would depend on the price of hay to begin with—the production as well as the rates?

Mr. Molony: Yes, sir.

The Chairman: Have you noticed from time to time—I suppose you give sufficient attention to the subject to enable you to answer as to the relative prices of hay between the two markets, Memphis and New York—how do they compare ordinarily?

Mr. Molony: Ordinarily the West is cheaper than they are in New York.

The Chairman: Take the two points—Memphis and New York?

Mr. Molony: It is cheaper in Memphis than in New York.

The Chairman: About what is the usual difference?

Mr. Molony: It will vary from two to five dollars a ton.

The Chairman: An average of about \$3.50?

Mr. Molony: Yes, sir.

The Chairman: Then, whenever you can make more than \$3.50 difference in the freight from New York, you would go that way?

Mr. Molony: I think I would.

The Chairman: For the present and recently, your market here has been west?

Mr. Molony: Yes, sir.

The Chairman: Do you remember how long this 19-cent rate from Memphis has been in force?

Mr. Molony: About 3 years.

The Chairman: And in that time the bulk of the trade has been from the West?

Mr. Molony: Yes, sir.

A. G. JACKSON recalled:

Mr. Baxter: Mr. Jackson, I wish you would explain to the commission when this rate was made 19 cents, and whether it was higher or lower before?

Mr. Jackson: The rate of 19 cents from Memphis to Charleston was reduced from 23 cents to 19 cents in August, 1891. That is my recollection. That reduction was made necessary on account of the movement by the rail and water lines. We were carrying a 4-cent higher rate from Memphis and Ohio and Mississippi River points than we are now carrying. It was necessary to reduce them to meet this water and rail competition,

Mr. Baxter: If you were to restore the rate to 23 cents, what would be the consequence?

Mr. Jackson: It would go back to the water lines.

Mr. Baxter: I will ask you—I concede Mr. Jackson has no such knowledge of the fact as would make his testimony competent, but we took the testimony of Mr. Marsh, who was in the auditor's office, to show the cost per ton per mile of car-load freight carried through between Atlanta and Augusta. Mr. Jackson did not make the compilation and does not know that it is correct. If there is no objection we will have proof by Mr. Marsh.

Mr. Northrop: If it is subject to correction I have no objection.

Mr. Baxter : Mr. Jackson, what does he show the cost per ton per mile, on car-load freight through Atlanta to Augusta, such as these car-loads were?

Mr. Jackson : This statement made by Mr. Marsh, showing earnings of train No. 6, March 21, 22 and 23, actual earnings of the train, shows that the cost per ton per mile on car-load freights is 4.2 mills per ton per mile; the cost of hauling miscellaneous freight is 8.89 mills in less than car-loads. Miscellaneous means less than car-loads in that sense.

The Chairman : That is over your line alone?

Mr. Jackson : Yes, sir.

The Chairman : And the expense would be about the same in transporting the freight received from another road?

Mr. Jackson : As if originating at one of our terminals?

The Chairman : Yes, sir.

Mr. Jackson : Well, yes, sir; there would be very little, if any, difference in cost.

The Chairman : This Memphis freight that is in dispute would cost about the same?

Mr. Jackson : Yes, sir; as I understand your question. You want to know whether it would cost any more or less for Memphis freight than to receive the same freight at Atlanta, Ga. There would be some increase in cost of transporting if it was received in our depots and loaded into cars at Atlanta. Memphis freight would be carried a little cheaper.

Cross-examination :

Mr. Northrop : Suppose that the grain that comes from the Mississippi and comes from Memphis were taken by way of Chicago, would it not be more expensive to take it to Chicago and bring it down here by the lakes, rail and steamer, than to transport it by rail 750 miles to Charleston—suppose the stuff, wherever it comes from, is deposited in Memphis, and it starts from Memphis up to Chicago, and then comes down by the water routes?

Mr. Jackson : It would never go to Memphis if it was going to Chicago.

Mr. Northrop : Suppose it originated at Memphis, would it not be more expensive to take it by way of Chicago than to come directly across by rail?

Mr. Jackson : Yes, sir; the distance is much greater.

Mr. Northrop : There is no competition between that grain that meets the Memphis line at Chicago to Charleston?

Mr. Jackson : Unless you consider the relations which the rates from Memphis bear to the rates from Chicago to Charleston; it would be more expensive to take that grain from Memphis to Chicago than to carry all rail from Memphis to Charleston.

79 Mr. Northrop : That is all.

The Chairman : Is there anything further, gentlemen?

Mr. Brawley : If the commission please, I am here to speak for Mr. Barnwell, my partner, who had charge of this case. I had no

knowledge of it. He was called to Washington by a case before the Supreme Court. I know nothing of the preparation of this case. Whether Mr. Barnwell will desire to put in any testimony, I do not know. I should like the privilege of consulting him if he has any testimony to put in.

Mr. Northrop: I do not think he wants to put in any testimony. If he does, we will have no objection, but we would not like a delay of the decision.

The Chairman: Assuming that he has no further testimony to put in, what will we do with the case?

Mr. Northrop: We are ready to submit it.

The Chairman: Will you give us what information you can in briefs after some reasonable time?

Mr. Baxter: What time will the commission allow to file briefs?

The Chairman: You can arrange it between yourselves.

Mr. Baxter: I would like to have a copy of the stenographer's notes, and I would like to be able to formulate a set of facts and have the pages of the testimony on which I rely.

The Chairman: How much time do you want, Mr. Northrop?

Mr. Northrop: Not very long. We are ready with our proposed findings now. This week would do me.

The Chairman: How long do you want, Mr. Baxter?

Mr. Baxter: So many days after I get from the stenographer a copy of the testimony, as I will rely on it to prove the facts. That, I suppose, would be most acceptable to the commission, that the counsel would first brief the propositions of fact that they want to be found, and then let the commission decide ten days after I get the copy from the stenographer.

The Chairman: We cannot tell when he will be ready with them. We will not be back to Washington for ten days.

Mr. Baxter: Can we not have ten days from the time we receive copies of the testimony?

The Chairman: We are not now furnishing copies.

Mr. Baxter: I did not know that. We relied on getting it from the stenographer.

The Chairman: We will give it to you this time.

Mr. Baxter: Well, I will take notice of that hereafter.

The Chairman: Well, Mr. Northrop; you will have ten days after you get a copy of the testimony and Mr. Baxter, you will have ten days additional.

There being no further business before the commission, at 1.10 p. m. the commission adjourned.

Question No. 1. On classes "C," "D" and "F" from Memphis, is the full South Carolina railway local rate added to the through rate, from Memphis to Augusta on business to Summerville, S. C.?

80 Answer. The full local rate of the South Carolina railway is added to the through rate, Memphis to Charleston, to make rate, Memphis to Summerville, S. C.

Question No. 2. What is the through rate from Memphis to Augusta, Ga., on business to Summerville, S. C., or what is the through

rate, Memphis to Augusta, and what is the full South Carolina railway local rate from Augusta to Summerville?

Answer. C.-27c., D.-23c., F.-47c.—Through rate, Memphis to Augusta for points beyond. Augusta to Summerville—C.-18c., D.-15c., F.-36c.

Question No. 3. What is the through rate Memphis to Charleston, and what is the South Carolina railway full local Charleston to Summerville on these classes?

Answer. Through rate Memphis to Charleston, S. C., C. 23c.; D. 19c.; F. 18c. Locals Charleston to Summerville, S. C., C. 9c.; D. 9c.; F. 18c.

Question No. 4. Is the nine cents charged from Charleston to Summerville, S. C., the authorized local of the commissioner?

Answer. Yes.

Question No. 5. I want the bill of lading on which this hay for Behlmer was handled, Memphis to Summerville, S. C.

Answer. Bill of lading attached.

Question No. 6. Ascertain from the car record office if the car of hay in question did arrive at Summerville on August 17, 1892?

Answer. M. P. car 7852 reached Summerville August 17th, 1892.

Question No. 7. Did the roads west of Augusta get a larger portion of the through rate on the hay to Summerville than they would on hay to Charleston?

Answer. Roads west of Augusta received the same on the through rate to Summerville as they received on the through rate to Charleston, S. C.

Question No. 8. What would be the portion of each road, Memphis to Charleston?

Answer. M. & C., 7.2 per 100 pounds; E. T., V. & G. R. R. or W. & A. R. R., 3.2 per 100 pounds; Ga. R. R., 3.9 per 100 pounds. Transfer, 1.5 per 100 pounds; S. C. R'y, 3.2 per 100 pounds.

Question No. 9. What would be the rate, Memphis to Summerville, via the route that this hay was handled?

Answer. 28 cents per 100 pounds.

Question No. 10. What is the rate on grain and hay from Chicago via the Erie canal and New York to Charleston?

Answer. Have no knowledge.

Question No. 11. What is the rate on this class of freight from Boston to Charleston?

Answer. 20 cents per 100 pounds.

Question No. 12. From New York to Charleston?

Answer. 14 cents per 100 pounds.

Question No. 13. From Philadelphia to Charleston?

Answer. 14 cents per 100 pounds.

81 Question No. 14. From Baltimore to Charleston?

Answer. No steamer line from Baltimore to Charleston. Rail and water via Virginia ports 17 cents per 100 pounds.

Question No. 15. What was the rate per ton per mile on the car-load in question; in other words, how many tons of hay was in the

car, and what was the gross freight, and what was the amount per ton per mile earned by each road handling the hay?

Answer. Ten tons. Gross freight, \$56.00; divided M. & C. \$14.40, E. T., V. & G. R. R. \$6.40, Ga. R. R. \$7.80, transfer \$3.00, S. C. \$24.40. The lines hauling earned per ton per mile as follows: M. & C. R. R. 4.6 tenths mills per ton per mile; E. T., V. & G. R. R. 4.6 tenths mills per ton per mile; Ga. R. R. 4.6 tenths mills per ton per mile. Transfer, arbitrary; S. C. R'y 2.1 tenths cents per ton per mile.

Question 16. How much less is the rate or portion of rate on hay, Memphis to Summerville, than the South Carolina railway received than the authorized local rate on hay from Augusta to Summerville?

Answer. Local rate, Augusta to Summerville, class "D," 15 cents per 100 pounds. S. C. R'y received 12.2 tenths cents per 100 pounds, or 2.8 tenths cents per 100 pounds less the local.

Memphis and Charleston Railroad Company and connections.

Through Bill of Lading.

The right to compress cotton reserved in this bill of lading.
This receipt to be presented without alteration or erasure.

MEMPHIS, TENN., Aug. 12, 1892.

Received by the Memphis and Charleston R. R. Co., of Moulton Davis Co., under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition, contents and value unknown.

Consigned to: Notify F. D. C. Kracke's Sons, Summerville, S. C.

(Original.)

Marks and numbers.	No. packages.	Description of articles.	Weight.
M. P. 7852	2,144	Bales T. hay..... 5,600	20,000

Ga. R. R.

B. HUGHES Agent.

Clyde Steamship Company—New York, Charleston, and Florida lines.

NEW YORK, August 1, 1889.

The following are rates to Charleston, based on the classifications of the Southern Railway and Steamship Association, with the exceptions noted below :

	Rates in cents per 100 pounds.													Per barrel.
	Classes.													
	1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	H.	F.	
From New York and Philadelphia.....	50	40	34	28	23	17	13	16	16	14	18	25	25	
From Boston.....	55	45	38	30	25	22	20	22	22	20	27	25	38	
Fall River....														
Providence...														

Exceptions to Southern Railway and Steamship Association classifications referred to above.....

WM. P. CLYDE & CO.,

General Agents, 12 South Wharves, Philadelphia; 5 Bowling Green, New York.

THEO. G. EGER,

Traffic Manager, 6 Bowling Green, New York.

Deposition of Theo. Nathan.

Interstate Commerce Commission.

H. W. BEHLMER

vs.

MEMPHIS AND CHARLESTON RAILROAD COMPANY ET AL. }

Deposition of Theo. Nathan, taken pursuant to stipulation hereto annexed, before John X. Smith, at office, No. 18 Broad street, Charleston, South Carolina, on the fifteenth (15th) day of May, eighteen hundred and ninety-three.

Witnesses for defendant: Theo. Nathan and W. H. Jones.

Appearance: Jos. W. Barnwell for defendant, D. H. Chamberlain, receiver; C. B. Northrop for petitioner.

It is hereby agreed between us that the following testimony shall be taken by John X. Smith, and written out by him and submitted to the commission, the signatures of the witnesses and commissioner and notice of the deposition as required by rule 12 being waived and the testimony taken as though complying in full with the requirements of that rule.

BRAWLEY & BARNWELL,

For D. H. Chamberlain, Receiver of S. C. R'y Co.

CLAUDIAN B. NORTHROP,

Attorney for Behlmer.

CHARLESTON, S. C., June 24th, 1893.

The sending of written testimony having been unavoidably delayed by the absence of Mr. Northrop from the State, it is hereby agreed that the said testimony be forwarded with the request that it be received by the commission as though in due time, and we waive all questions of time or regularity as to filing the same.

CLAUDIAN B. NORTHROP.

JOS. W. BARNWELL.

Mr. THEO. NATHAN, being duly sworn, says he affirms as follows:

Mr. Northrop objects to all testimony, except from Memphis itself, as to freight emanating from any other points, such as Chicago, New York or other markets as being irrelevant and immaterial, and objects to all opinions of witnesses as to the effect upon traffic from Memphis to Charleston, which a reduction of the rate to Summer-ville, S. C., might produce, and all opinion testimony. This will apply to all witnesses.

Question- by Mr. Barnwell, Answers by Mr. Nathan.

Q. What business are you in?

A. In the grain business.

Q. Here in Charleston?

A. Yes, sir.

Q. How long have you been in the grain business?

A. A year and some months.

Q. Have you ever brought hay from Chicago, via the lakes, canal and ocean, and, if so, at what rate did you pay?

A. I have never brought hay from Chicago to Charleston, but have to Savannah, Ga., which takes the same rate as Charleston. I do not remember what rate I paid at the time.

Q. Do you know what the rates have been to Charleston, via the lakes, canal and ocean from Chicago?

A. As late as last June the rate was twenty-two (22) cents per 100 pounds on class D, which embraces grain, corn, oats and hay.

Q. What are the rates now, about the same?

A. I think they are the same.

Q. Do you know what the rate is by rail from Memphis to Charleston on hay and grain?

A. Nineteen (19) cents per 100 pounds.

Q. How does most of the hay and grain come to Charleston from Memphis?

A. It varies according to the season.

Q. What do you mean by that?

A. I mean that in the summer months we can always get grain from Chicago by way of the lakes, and steamers from New York down, and the winter we could not get it by that route, because of the ice on the lakes, but we can get it in the winter from Chicago by rail to New York and steamers down. While the ice is in the lakes, the rate of freight is usually not as low as in the summer

84 season, when the lakes are clear, and we have straight lake, canal and ocean freights. During the season that we have in these latter, we usually buy from the West.

Q. What determines the markets into which you will buy?

A. The lowest freight rates.

Q. If the freight rate by rail from the West, from Memphis, for instance, were raised above the present rates, what would be the effect upon your ordering goods at the West?

A. I have to buy them all from points where I could utilize the lakes, canal and ocean route, that is, if the rates were raised very much higher than they are at present. Of course a cent or two would make no difference.

Q. Does a great deal of hay and grain come from Chicago by canal, lake and ocean route to Charleston at times?

A. A good deal. I bought last year upwards of a hundred (100) car-loads in a month in Chicago, and in the last two weeks there has been received here two cargoes of corn by schooner, from Virginia. Last year I brought four cargoes by schooner from Baltimore, Norfolk and Virginia points. During that time I could buy corn in the West and bring by rail to compete with the prices laid down by water shipment. Some time ago I also brought hay from Baltimore at prices that enabled me to place it here for less money than it would have cost me had I brought it from Memphis or any other western points.

Q. What regulates the rail rates to Charleston on grain and hay from Memphis and the West?

A. Water competition.

Cross-examination by Mr. NORTHROP:

Q. Does not the price of the article have something to do with the purchasing market?

A. The rate delivered here has nothing to do with it.

Q. That is not answering my question. Do you get better prices as a rule in the West than you do in New York?

A. I cannot say. I have at times brought grain and hay for less money in Baltimore, also New York and in Boston than I could buy at other western points at the same periods.

Q. Do you not usually get cheaper prices in the West?

A. We do not consider western prices at all, because we nearly always buy on delivered prices and not at what is termed f. o. b. prices, consequently it is the matter of freight rates that affect our prices altogether.

Q. If you could get grain for ten (\$10.00) dollars per ton in Memphis, and it was selling for eighteen (\$18.00) dollars per ton in New York you would buy in New York, if you could get cheaper freight rates to Charleston? Would you not?

A. I would buy from wherever I could deliver the cheapest.

Q. Is it not true that the price of this stuff is less (disregarding freight rates for the present) in the West than they are in New York on this article as the rule?

A. Yes; as a rule they are.

Q. Do you order from the West or from New York, as a rule?

85 A. As a rule I order from the West, because all things being equal I prefer to have my shipments by railroad delivery.

Q. Is not the proportion of grain and hay that comes by lake and rail from Chicago relatively small in comparison to the whole volume that reaches this point during the year?

A. Yes, by far the greater part of grain and hay that comes to Charleston, comes directly from the West by rail.

Q. Can you get grain from Memphis here by water? Do you ever bring shipments that way?

A. I have brought it from Galveston.

Q. My question is: Did you ever bring any from Memphis here by water?

A. No.

Q. Did you ever hear of anybody else doing so?

A. No, I don't know that I ever have.

It is admitted that Mr. W. H. Jones, who is a large grain and hay merchant in the city of Charleston, if present, would testify that if the rates on grain from Memphis to Charleston were raised materially from the present rate of nineteen (19c.) cents per 100 pounds, that is to say, more than one or two cents per 100 pounds, that grain and hay would be brought to Charleston by canal, lake and ocean from Chicago, rather than by all rail from Memphis.

Mr. Jones will admit that he has never brought any hay or grain from Memphis by water to Charleston.

This is subject to the objection like other testimony taken this morning as irrelevant, immaterial and a matter of opinion.

INTERSTATE COMMERCE COMMISSION.

I, Edward A. Mosely, secretary of the Interstate Commerce Commission, do hereby certify that the foregoing is a correct and complete copy of the original testimony and extracts of the exhibits in case No. 362, before said Interstate Commerce Commission of H. W. Behlmer against The Memphis and Charleston Railroad Company *et al.*

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the commission, this 14th day of December, 1894.

[SEAL.]

EDW. A. MOSELY, *Secretary.*

Deposition.

UNITED STATES OF AMERICA :

In the United States Circuit Court, Fourth Circuit. In Equity.

H. W. BEHLMER, Plaintiff,

vs.

THE LOUISVILLE AND NASHVILLE R. R. CO. ET AL. }

This deposition taken before me, Mastin S. Decker, a notary public, is by consent taken without the usual formalities subject to the right of defendants to file such cross-interrogatories as they may be advised within the time agreed upon.

Personally appeared before me J. M. SMITH, who deposes as follows, to wit:

Question 1. State your name, occupation and residence.

Answer. J. M. Smith, assistant auditor of the Interstate Commerce Commission. Residence, Washington, D. C.

Question 2. How long have you occupied your present position, and what was your previous business?

Answer. For about the last seven and a half years I have occupied my present position. Prior to that time I was connected with the traffic department of the Louisville and Nashville railroad, for about thirteen years, up to 1888.

Question 3. Are you familiar with the tariffs, rates and methods of making rates from what is known as the Central Traffic Association territory, to the trunk-line territory and the New England States?

Answer. I am generally familiar with the basis on which the rates are made in the territory mentioned.

Question 4. Describe the territory known as the Central Traffic Association territory, and outline it on the map marked "Exhibit A," attached to this deposition.

Answer. The Central Traffic Association is formed by railway companies located within the area bound as follows:

On the east by the western termini of the trunk lines, whose termini are Toronto, Canada, Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk and Salamanca, N. Y.; Pittsburg and Allegheny, Pa.; Bellaire, O.; Wheeling and Parkersburg, W. Va., and Ashland, Ky. On the north by the line of the Grand Trunk railway from Toronto to Fort Gratiot, including the points thereon, thence via the Great Lakes to Chicago. On the west by a line through Joliet and Streator, to Peoria, thence via T. P. & W. R'y to East Burlington, thence via the Mississippi river to its junction with the Ohio river. On the south by the Ohio river.

Question 5. Describe the trunk-line territory and outline it on map marked "Exhibit A" attached to this deposition.

Answer. The territory of the Trunk Line Association includes the territory west of New England and east of, including Toronto, Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk, Salamanca, Erie, Pittsburg, Bellaire, Wheeling, Parkersburg and Charleston, W. Va.

Question 6. What is the general system of making rates on all classes of freight east bound, from what is known as the Central Traffic Association territory, to the trunk-line territory and New England?

Answer. The rates from the Central Traffic Association territory to the trunk-line and New England territory are made as follows:

The rates from Chicago to New York are fixed by what is known as the joint committee, which is a committee representing
87 the Trunk Line and Central Traffic Associations, and also includes certain New England roads, and others which are not members of either of the above-mentioned associations. These rates between Chicago and New York city are the basis of all other rates from points in this Central Traffic territory to eastern points, Boston being made certain differentials higher than New York city, and Baltimore, Philadelphia and other principal points certain differentials lower. Rates to local points in these territories are made either the same as the above-mentioned points, or certain differentials higher or lower. Intermediate points on the direct line are usually made the same as the terminal points, or lower. For instance, points in the vicinity of New York, Philadelphia, Boston and Baltimore, usually take the same rates as these cities, or a lesser rate, the farther west they happen to be situated, until the western boundary of the trunk-line territory is reached. From all other points in the Central Traffic Association territory than Chicago, the rates to the trunk line, New England territory, are made a percentage of the Chicago and New York rate. For instance, Peoria, Ill., which is west of Chicago, is a 110 per cent. of this rate, or 10 per cent. higher than Chicago. Terre Haute, Ind., takes a hundred per cent. of the Chicago rate, or the same as Chicago; Columbus, O., takes 77 per cent. of the Chicago rate, being farther east.

Question 7. How does this system affect long and short hauls?

Answer. Under this system throughout the territory mentioned the rates for shorter distances are generally not higher than for the longer distances; the intermediate points usually taking the same or lower rate than the principal terminal point.

Question 8. Give some instances of intermediate points taking the same rate as the terminal.

Answer. Exhibit B shows certain intermediate points taking the same rates as New York, Philadelphia, Baltimore and Boston, also the distances from those points and the roads on which said points are situated.

Question 9. According to tariffs filed by the carriers with the Interstate Commerce Commission, state the rates on grain from Chicago to Buffalo, Albany, New York, Boston, Philadelphia and Baltimore, from January 1st, 1894, to the present date; also the distances, and the rate per ton per mile received by the roads for carriage.

Answer. Exhibit C shows the rate on grain from Chicago to the points mentioned for the period mentioned, also the distances via the routes given therein, also the rate per ton per mile.

Question 10. According to the tariffs filed by the carriers with the Interstate Commerce Commission, state the rates on grain from

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Memphis to Baltimore, Philadelphia and New York, also to Summerville and Charleston, from January 1st, 1894, to the present date, also state distances and rate per ton per mile?

Answer. Exhibit D shows the rates from Memphis to the points named for the period named, also the distances via the routes given therein, also the rate per ton per mile.

88 Mr. Northrop, counsel for plaintiff, states that these exhibits are presented subject to any correction which the counsel for defendants may make.

(Signed)

J. M. SMITH.

UNITED STATES OF AMERICA,
State of South Carolina, City of Washington, } ss:

Personally appeared before me, Martin S. Decker, a notary public, in and for said District and city, J. M. Smith, who on oath says the contents of the foregoing deposition are true.

J. M. SMITH.

Sworn to before me, in the city of Washington, this 20th day of May, A. D. 1895.

(Signed)

MARTIN S. DECKER,

[NOTARIAL SEAL.]

Notary Public, District of Columbia.

(Here follows map marked p. 88a.)

EXHIBIT B.

Statement.

INTERSTATE COMMERCE COMMISSION,
AUDITOR'S OFFICE, WASHINGTON, May 17, 1895.

Points on the Pennsylvania railroad taking New York rates on shipments of freight from Central Traffic Association territory:

Elizabeth, N. J., 14 miles west of New York.

Menlo Park, N. J., 24 miles west of New York.

Trenton, N. J., 56 miles west of New York.

Points on the Pennsylvania railroad taking Philadelphia rates:

Frazer, Pa., 24 miles west of Philadelphia.

Columbia, Pa., 80 miles west of Philadelphia.

Points on the Baltimore and Ohio railroad, taking Baltimore rates:

Annapolis Junction, Md., 17 miles west of Baltimore.

Washington, D. C., 40 miles west of Baltimore.

Rockville, Md., 56 miles west of Baltimore.

Harper's Ferry, W. Va., 95 miles west of Baltimore.

Cumberland, Md., 192 miles west of Baltimore.

Points on the Boston and Albany railroad, taking Boston rates:

Worcester, Mass., 44 miles west of Boston.

Brookfield, Mass., 67 miles west of Boston.

Springfield, Mass., 99 miles west of Boston.

Westfield, Mass., 108 miles west of Boston.

Dalton, Mass., 145 miles west of Boston.

Chatham, N. Y., 177 miles west of Boston.

INTERSTATE COMMERCE COMMISSION,
AUDITOR'S OFFICE, May 17, 1895.

EXHIBIT C,

Showing Rate on Grain and Rate per Ton per Mile from January 1st, 1894, to Present Date.

From Chicago, Ill., to—	Mileage via L. S. & M. S., 540 miles.	Mileage via L. S. & M. S., N. Y. C. & H. R., 837 miles.	Mileage via Penna., 912 miles.	Mileage via L. S. & M. S., N. Y. C. & H. R., B. & O., 1,039.	Mileage via Penna., 822.	Mileage via B. & O., 859.
	BUFFALO, N. Y.	ALBANY, N. Y.	NEW YORK.	BOSTON.	PHILADELPHIA.	BALTIMORE.
	Rate (in cents) per 100 lbs.	Rate (in cents) per 100 lbs.	Rate (in cents) per 100 lbs.	Rate (in cents) per 100 lbs.	Rate (in cents) per 100 lbs.	Rate (in cents) per 100 lbs.
January 1, 1894.....	15	24	25	27	23	22
February 27, 1894.....	124	19	20	22	18	17
November 12, 1894.....	15	24	25	27	23	22
February 4, 1895.....	124	19	20	22	18	17
	Rate per ton per mile.	Rate per ton per mile.	Rate per ton per mile.	Rate per ton per mile.	Rate per ton per mile.	Rate per ton per mile.
	.0056	.0057	.0055	.0052	.0056	.0051
	.0046	.0045	.0044	.0042	.0044	.004
	.0056	.0057	.0055	.0052	.0056	.0051
	.0046	.0045	.0044	.0042	.0044	.004

Rates to Buffalo, Albany, and Boston shown in L. S. & M. S. tariff, No. 39, of November 12, 1894. (File No. 7977.)
Rates to New York and Philadelphia shown in Star Union Line joint tariff, No. 111, of February 11, 1895. (File No. 2115.)
Rates to Baltimore shown in B. & O. tariff C, No. 216, of February 4, 1895. (File No. 8692.)

INTERSTATE COMMERCE COMMISSION,
AUDITOR'S OFFICE, May 18, 1895.

EXHIBIT D,

Showing Rates on Grain and Rate per Ton per Mile from January 1, 1894, to Present Date.

FROM MEMPHIS, TENN., to—	Mileage via Bristol, Lynchburg, Washington, 971.		Mileage via Hagerstown and Harrisburg, 1,121.		Mileage via Hagerstown and Harrisburg, 1,211.	
	BALTIMORE.		PHILADELPHIA.		NEW YORK.	
	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.
January 1, 1894.....	31	.0064	32	.0057	34	.0356
March 2, 1894	25	.0051	26	.0046	28	.0046
November 12, 1894	28	.0058	29	.0052	31	.0051
March 14, 1895	31	.0064	32	.0057	34	.0056

Rates shown in M. & C. joint f't tariffs, No. 11, of January 1, 1894; No. 14, of February 5, 1894, and No. 20, of March 14, 1895.

FROM MEMPHIS, TENN., to—	Mileage. M. & C..... 310 E. T., V. & Ga. 152 Ga..... 171 S. C..... 115		Mileage. M. & C..... 310 E. T., V. & Ga.. 152 Ga..... 171 S. C..... 137	
	SUMMERVILLE, S. C.		CHARLESTON, S. C.	
	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.
January 1, 1894.....	28	.0075	19	.0049
March 6, 1894	28	.0075	14	.0036
April 6, 1894, to present date	28	.0075	19	.0049

Rates shown in M. & C. f't tariffs, No. 26, of December 8, 1892 (file No. 2148), and No. 27, of February 18, 1895 (file No. 2406).

91

Stipulation.

In the Circuit Court of the United States for the District of South Carolina.

H. W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL. }

In this cause it is stipulated by counsel that the following-described documents, offered in evidence by the defendants, may be filed and used as evidence on the hearing of the cause, subject to all objections as to their relevancy and competency:

1st. Agreement of the Southern Railway and Steamship Association, adopted January 14, 1892, marked Exhibit "A" to this stipulation.

2nd. Tariff of Erie and Western Transportation Company, Anchor line, lake and rail, via Erie and Pennsylvania railroad, it being joint east-bound freight tariff No. 11, taking effect August 15, 1892, marked Exhibit "B" to this stipulation.

3rd. Pages 114 and 115 of 20th report of the railroad commission of Georgia, October 15, 1892, marked Exhibit "C" to this stipulation.

4th. South Carolina Railway Company local freight tariff No. "C4," taking effect June 1, 1889, and which was approved by the railroad commission of the State of South Carolina, marked Exhibit "D" to this stipulation.

5th. Extracts from annual report of the South Carolina Railway Company to the railroad commission of the State of South Carolina, for the year ending June 30th, 1892, marked Exhibit "E" to this stipulation.

ED. BAXTER,
Solicitor for L. and N. R. R. Co. et al.
CLAUDIAN B. NORTHROP,
Attorney for Plaintiff.

EXHIBIT A TO STIPULATION OF COUNSEL.

The Southern Railway and Steamship Association.

Agreement.

This agreement, made this 14th day of July, A. D. 1892, by the parties whose signatures are hereunto attached, witnesseth that—

Whereas the establishment and maintenance of tariffs of uniform rates, to prevent unjust discriminations, such as necessarily arises from the irregular and fluctuating rates which inevitably attend the separate and independent action of transportation lines, is important for the protection of the public; and

Whereas it is deemed to be to the mutual advantage of the public

92 and the transportation companies, that business in which they have a common interest should be so conducted as to secure a proper correlation of rates, such as will protect the interests of competing markets, without unjust discriminations in favor of, or against any city or section; and

Whereas these objects can be attained by the co-operation on the part of the various transportation lines, engaged in the traffic of the territory south of the Potomac and Ohio rivers and east of the Mississippi river; and

Whereas such co-operation is absolutely necessary to a strict compliance with the requirements of the act of Congress, entitled "An act to regulate commerce."

Now, therefore, in order to secure such co-operation among the said transportation lines, and to provide means for the prompt adjustment of the differences which may arise between them, by placing the conduct of all the traffic common to two or more companies, under well-defined rules and regulations which will insure the maintenance of rates, it is mutually agreed as follows:

Article first.

SECTION 1. The association herein formed shall be styled the Southern Railway & Steamship Association.

Article second.

SECTION 1. The territory of this association shall be that territory lying south and west of the Virginias, south of the Ohio river, and east of the Mississippi river. The traffic subject to this agreement shall be all business for which two or more of the parties hereto compete, having origin or destination within this territory. It is understood that the following traffic is not covered by this agreement: (1.) Traffic carried between points on the Ohio and Mississippi rivers, and (2) traffic between points on the designated northern and western boundary lines and points outside of the defined association territory.

It is further understood and agreed that traffic to or from a local point on any line shall be considered local to that line throughout its transportation by such line, and so far as that line may be concerned, shall not be subject to this agreement, provided that rates to or from such local point shall not be made so as to cut the rates fixed under the rules of the association to or from the nearest competing point through which such local traffic may pass.

SECTION 2. For the mutual protection of the various interests, and for the purpose of securing the greatest amount of net revenue to all the companies parties to this agreement, it is agreed that what are termed western lines shall protect the revenue derived from transportation by what are known as eastern lines, under the rates as fixed by this association, so far as can be done by the exaction of local rates, and that eastern lines shall, in like manner, protect like revenue of western lines.

93 SECTION 3. That a line drawn from Toronto on the north shore of Lake Ontario through Lewiston, Niagara Falls, Buf-

falo, Erie City, and the line of the Alleghany Valley railroad to Pittsburg, thence down the Ohio river through Wheeling and Parkersburg to Huntington, W. Va., be made the dividing line between eastern and western lines for the territory hereinafter outlined, it being understood that points on this line shall be common to lines through the eastern and western gateways, together with such points adjacent thereto, from which the rates shall be the same as from the points above named through the gateways of Cincinnati and Louisville. The rate committee shall agree upon the common points adjacent to said line as provided above, or failing to agree, such common points shall be designated as provided under this agreement where the rate committee fails to agree. That western lines shall not make joint rates from points east of that line and common points agreed upon from any point east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola, Fla.

SECTION 4. The eastern lines, including the Richmond and Danville railroad, the East Tennessee, Virginia and Georgia railway, and the Norfolk and Western railroad, shall not make joint rates on traffic from points west of the line designated in section 3 and the common points agreed upon to any points on or west of a line drawn from Chattanooga through Athens, Augusta and Macon to Live Oak, Fla.

SECTION 5. The traffic from points on the dividing line and common points designated in section 3, may be carried by either the eastern or western lines, but only at such rates as may be agreed upon.

Article third.

SECTION 1. The representatives of the several companies, members of this association, shall meet in convention annually on the second Wednesday in June, in the city of New York, or at such other place as may be mutually agreed upon, and special meetings may be called at any time as hereinafter provided.

Article fourth.

SECTION 1. The business to be transacted in general convention shall be confined to the election of officers, fixing their salaries, the representation of members on the executive board, and the adjustment of such other matters as cannot be properly determined by the executive board with the aid of the board of arbitration. Each company, a member of the association, shall have one vote. Two-thirds of the whole vote of the members present shall be required to make action of the convention binding. Companies members of the association may be represented in the convention by the president, vice-president, general manager, traffic manager, superintendent, or general freight agent, in person or by proxy, provided

94 such proxy presents to the secretary a properly attested power of attorney. In case of more than one nomination being made for any office, the election shall be by ballot.

Article fifth.

SECTION 1. The following officers shall be elected at the annual meeting, and shall hold their offices until the next annual meeting, and thereafter until their successors are elected: A president, a vice-president, a commissioner, and three arbitrators. A secretary shall be appointed by the commissioner, subject to confirmation by the executive board.

SECTION 2. In the event of a vacancy occurring in any elective office, the president may fill the vacancy until a general meeting can be convened to elect a successor, and such meeting shall be called by the president within twenty days after the vacancy occurs.

Article sixth.

SECTION 1. The East Tennessee, Virginia and Georgia railway, Norfolk and Western railroad; Richmond and Danville railroad; Seaboard and Roanoke railroad; Central Railroad of Georgia, including the Port Royal and Augusta railway; Georgia railroad; Western and Atlantic railroad; Wilmington and Weldon railroad; Atlanta and West Point railroad, and Western Railway of Alabama; Savannah, Florida and Western railway; Old Dominion Steamship Company; Ocean Steamship Company; Merchants' and Miners' Transportation Company; Cape Fear and Yadkin Valley railway; Cincinnati, New Orleans and Texas Pacific railway; Illinois Central railroad; Kansas City, Memphis and Birmingham railroad; Louisville and Nashville railroad; Louisville, New Orleans and Texas Railway and Newport News and Mississippi Valley Company; Mobile and Ohio railroad; Nashville, Chattanooga and St. Louis railway; Alabama Great Southern railroad; Baltimore, Chesapeake and Richmond Steamboat Company; Baltimore Steam Packet Company; Georgia Pacific railway; Georgia Southern and Florida railroad; Memphis and Charleston railroad; South Carolina railroad; Charleston and Savannah railroad; Clyde Steamship Company, and such other lines or companies as may execute this agreement shall each designate a representative, who shall be authorized to represent them in all matters of business with the association or its members. The several representatives so designated and such other representatives of members of the association as may be designated by the executive board, shall constitute the executive board, of which the commissioner shall be chairman. If any company or line which is entitled to a representative fails to appoint one, or if their representative be not present at any meeting of the executive board, such company or line shall be represented by the commissioner.

Article seventh.

SECTION 1. The executive board shall meet at the call of the commissioner, whenever and wherever in his judgment it is necessary, or when any three members of the board request it; but all such calls must state the object of the meeting, and the subjects to be acted upon by the board. All absent members shall be represented

by the commissioner, whose duty it shall be to make himself familiar with their views and interests, so that he can represent them properly; and votes cast by the commissioner for absent members, at any meeting, on any subject stated in the call, shall have the same force and effect in binding such members as if cast by them in person. Other subjects than those mentioned in the call may be considered and acted on in the meeting of the executive board, but the assent of absent members must be obtained, or a decision of the board of arbitration, before such action becomes binding upon them. The executive board shall have jurisdiction over all matters relating to the traffic covered by this agreement, but shall act only by unanimous consent of all its members. In the event of a failure to agree, the questions at issue shall be settled by the board of arbitration as hereinafter provided for.

SECTION 2. The principle of an apportionment of business subject to arbitration shall be recognized in the operations of the association so far as this can be lawfully done.

Article eighth.

SECTION 1. The executive board shall have the right at their discretion to appoint committees and other subcommittees, either of their own number or from among the officers and agents of the companies, members of the association, and to delegate to such subcommittees jurisdiction over such matters as may be specially committed to their charge. With a view of a proper relative adjustment of all rates, and especially a proper relative adjustment of rates on similar articles from the East and West to common territory, the rate committees shall have sole authority to make all rates and classifications on all traffic covered by this agreement, subject to decision of the commissioner, the executive board, or board of arbitration, as hereinafter provided, in case such rate committees cannot agree; but if the rate committees shall fail or omit to make rates on any traffic covered by this agreement, the commissioner shall have authority to make such rates, it being the intention that there shall be properly authenticated tariffs of rates on all such traffic.

SECTION 2. Subcommittees shall only act by unanimous consent, and, failing to agree, the questions at issue may, upon demand of any member, be referred to the executive board for action at their next meeting, or the votes of the members of the executive board may be taken separately and apart by correspondence, and such questions may be submitted direct to the board of arbitration, when so authorized by a majority of the executive board.

96 SECTION 3. The commissioner shall be *ex officio* chairman of all subcommittees, and as such shall be the medium of communication between subcommittees and the executive board. Absent members of subcommittees shall be represented by the commissioner, as in case of absent members of the executive board. During the interim between the reference of any matter of difference from a subcommittee to the executive board, and the final determination of such matter, the commissioner, if he deem it a

matter requiring prompt action, shall have authority to decide it temporarily, and his decision shall be binding on all parties until reversed by the executive board or by arbitration.

Article ninth.

SECTION 1. The executive board shall have authority to make from time to time such rules and regulations, not inconsistent with this agreement, as may be necessary to secure a systematic conduct of the affairs of the association and attain the objects for which it is formed.

Article tenth.

SECTION 1. The president shall preside over all general meetings of the association, certify to the record of such meetings, and communicate the proceedings to all the members. He shall call a general meeting of the association whenever he is requested to do so by three members of the executive board, or whenever it is in his judgment necessary.

SECTION 2. The vice-president, in the absence of the president, shall be empowered to perform all the duties of the president.

Article eleventh.

SECTION 1. The board of arbitration shall hear and determine all questions which may be submitted to them under this agreement, or by consent of the parties, and the decisions of the said board shall be final and conclusive.

Article twelfth.

SECTION 1. The secretary shall make complete and accurate records of the proceedings of all general meetings of the association, the originals of which shall be preserved in the general office of the association, and copies furnished to each member. He shall also act as secretary to the board of arbitration, to the executive board, and to all committees hereinafter provided for, and preserve similar records of their proceedings, and perform such other duties as may be assigned him by the commissioner.

Article thirteenth.

SECTION 1. The commissioner shall be the chief executive officer of the association, and as a representative of its members, both severally and jointly, shall act for them in all matters that come within the jurisdiction of the association, in conformity with the requirements of his contract, and the instructions of the executive board and committees herein provided for, but exercising this discretion in all cases which are not provided for either by this agreement or by the executive board and committees acting under its authority and sanction. When directed by the executive board, the commissioner shall also take charge of the reports and claims, and appoint such clerks and claim agents as may be necessary, and

charge up the expense to the roads interested in the business, on an equitable basis, managing the business for the benefit and at the cost of the companies interested. He shall also have authority to reduce the rates when necessary to meet the competition of lines or roads not parties to this agreement, and of lines parties to this agreement, when such lines fail to maintain the rates as established under the agreement, and he may at the same time make corresponding reductions from other points from which relative rates are made. He shall have such authority over the traffic officers and their subordinates and over the accounting departments of the parties hereto as may be necessary to enforce the terms of this contract relative to the maintenance of rates, and to require information relating to the traffic to be furnished to him in such form or manner as he may deem necessary. He shall have access, either in person or by deputy to the books, papers, correspondence, etc., of any of the officers, agents or employees of the parties hereto, that relate to the freight traffic covered by this agreement.

Article fourteenth.

SECTION 1. The commissioner shall keep such accounts of the traffic covered by this agreement, and make such report of the same, as may be directed by the executive board.

Article fifteenth.

SECTION 1. All disbursements of the funds of the association shall be made by the commissioner, who shall give bond with security, in such amount as shall be satisfactory to the executive board; that he will duly and properly account for all moneys of the association, or belonging to members thereof, which may in any manner come into his possession or under his control. No payments shall be made except on properly receipted vouchers which shall be held subject to inspection by the executive board, or such person or persons as may be appointed by them for that purpose.

Article sixteenth.

SECTION 1. In order to provide for the prompt payment of any fines that may be assessed against any member of this association for violating its rules, each company shall deposit with the commissioner an amount equivalent to four (\$4.00) dollars for
98 each mile of the road operated by said company under the provisions of this agreement, or in case where a company operates a water line, four (4.00) dollars for each mile allowed as a prorating distance in the division of through rates; provided, such amounts shall not exceed in the aggregate the sum of five thousand (\$5,000) dollars or less than five hundred (\$500) dollars for any one company; but, in all cases where fines are assessed, the commissioner is hereby authorized to draw at sight on the parties against whom such fines are assessed for the full amount of said fines, and each company, party to this agreement, hereby binds itself to

promptly pay such drafts, it being the intent and meaning of this section that the deposit herein provided for shall not be diminished by reason of the payment of any fines that may be assessed against a company making such deposit.

Article seventeenth.

SECTION 1. The commissioner shall be furnished with copies of all manifests for traffic covered by this agreement, such copies to be forwarded at the time the shipments to which they appertain are made, and shall show the original shipping point and through rates, and also the divisions thereof so far as such divisions are controlled by this agreement, and abstracts of all such manifests shall be furnished to the commissioner at the expiration of each month; but it is understood that members of the association shall not have access to any such manifests, or be furnished with the names of consignors or consignees. The tonnage books of every company in the association shall be open at all times to the inspection of the commissioner or such agents as he may from time to time appoint, for the purpose of enabling him to get a complete record of all traffic covered by this agreement.

Article eighteenth.

SECTION 1. Copies of all rates that may from time to time be agreed upon, or fixed in the manner provided, shall be furnished promptly to the auditors and other officers of the parties to this contract, and they shall see that the rates are enforced in conformity therewith, and that no variations are made from such rates or manifests, by voucher or otherwise.

Article nineteenth.

SECTION 1. That all-rail rates to and from the ports of Boston, Providence, New York, Philadelphia and Baltimore, shall be higher than the rates by water or combined water and rail lines by the present differentials as established by the board of arbitration July 19, 1889, and subject to the Southern Railway and Steamship Association classification.

SECTION 2. Water lines or combined water and rail lines may insure against marine risks by issuing insured bills of lading between the above-named ports and points to which they were being applied on January 1st, 1892, provided they give two weeks' written notice to the commissioner, naming the points to which they will issue insured bills of lading.

SECTION 3. No water line or combined water and rail line shall assume the cost of insurance against marine risk in any other manner than herein provided for, viz., by the issue of insured bills of lading. It is, however, distinctly understood and agreed that no reduction of the established tariff rates, rebates or consideration of any kind, shall be given or offered to influence shippers, or to secure their preference for any road or line.

SECTION 4. The above-named differentials as between all-rail lines and water or combined water and rail lines, including the territory to which they apply, shall not be changed except by arbitration, which may at any time be called for by any party to this agreement.

Article twentieth.

SECTION 1. The parties to this agreement who control all-rail lines through Alexandria, Hagerstown, Richmond or Norfolk, agree to protect the water lines or combined water and rail lines upon the basis of the above-named differentials, or such other differentials as may be fixed by arbitration, in making rates between points in the territory covered by this association and all interior points in the Northern and Eastern States east of the territorial line named in article second, section 3, of this agreement, unless when and where the combinations of locals through the gateways of Cincinnati, Louisville, Ashland, Hagerstown, Alexandria, Richmond or Norfolk makes a lower rate; it being the intent of this agreement to protect the water or combined water and rail lines to the extent of the differentials named in article nineteenth, or such other differentials as may be fixed by arbitration in the construction of all-rail rates between points in Northern and Eastern States east of the territorial limit above mentioned.

SECTION 2. It is also agreed that in cases where a combination of locals to and from interior points, by rail lines, make lower totals than the established water lines, port rates plus differentials, the rates may be by all lines the lowest combination, but shall not be less than such combination.

SECTION 3. In all cases changes of rates made under above provisions shall be made by the rate committee or the commissioner, who shall promptly notify all parties interested.

Article twenty-first.

SECTION 1. The commissioner, with the approval of the executive board, shall organize such a system for the rendition of tonnage and revenue reports of the traffic covered by this agreement as shall enable the commissioner to be at all times fully informed of the movements thereof, and the observance of rates established
100 therefor, in order that he may detect promptly any violation of rates, and keep each company or line informed of the action of the other companies or lines. For these purposes, the commissioner, at his discretion, may appoint agents to examine the books of the members of the association, and inspectors of the weights and classifications, who shall at all times have access to and be permitted to examine goods. Any losses or damages resulting to initial carrier from the opening of packages by inspectors, shall be prorated on the basis of revenue. The expenses of such agents and inspectors shall be distributed among the members as hereinafter set forth. Tonnage and revenue statements shall be rendered monthly to each member of the association, and also annually on the 30th day of April, in a report to be made by the commissioner

at the expiration of each year and distributed to the members at least two weeks before the annual meeting.

Article twenty-second.

SECTION 1. All measures necessary to carry out the purpose of this agreement shall be taken jointly by the parties hereto, and should any question arise upon which they cannot agree, in relation to the terms of this contract, or to any matter arising thereunder, it shall be decided by arbitration, as herein provided, it being one of the fundamental principles of this contract that no party shall take separate action in any matter affecting the intent of one or more of the other parties contrary to the spirit and interest of this contract, and that all differences relating to the establishment, adjustment and maintenance of rates upon traffic covered by this contract, shall be adjusted by arbitration.

Article twenty-third.

SECTION 1. Whenever rates have been fixed by the rate committee, the commissioner, the executive board, or by arbitration, there shall be no reduction from such rates, without the consent of the commissioner. No member of the association shall reduce such rates directly or indirectly, by any special rate, rebate or drawback, or by payment of commissions, or by reductions on manifests, or by combination of local rates, or by rebilling, or by underbilling weights, or by any consideration in the way of free transportation, or in any manner, or by any device whatsoever.

SECTION 2. It is distinctly understood and agreed that the maintenance of rates as established under the rules of the association is of the very essence of this agreement, and the parties hereto pledge themselves to maintain them, and to require all their connections to maintain such rates, and in the event of any company or line or its connections not members of the association failing to conform to this obligation, the other parties in interest pledge themselves to increase their proportions of through rates sufficiently to protect the authorized rates, and to apply full local rates upon all traffic
101 subject to the association agreement coming from or going to such offending lines, whenever required by the commissioner to do so.

SECTION 3. Whenever the commissioner shall have reason to believe that the rates as established under the rules of the association are not being fully maintained, or that the rules or regulations or provisions of the agreement designed to secure their maintenance are not being complied with by any line or company, member of this association, it shall be his duty to make a full investigation of the facts in such cases, and if, in his judgment, there has been any violation of the agreement on the part of any member or members of this association, he shall submit the evidence in such case to the board of arbitration, and if the board of arbitration shall find, after a full hearing of the case, that any member is or has been guilty of violating this agreement, it shall impose such penalties therefor as

it may deem proper and commensurate with the injuries inflicted upon the association and of competing lines parties to this agreement; provided the infliction and enforcement of one penalty shall not prevent the infliction and enforcement of other penalties in case of continued or further violation of the agreement by the same member. The commissioner shall enforce such penalties, making use, if necessary, of the fund provided for that purpose. Any surplus over and above the amount that may be awarded by the board of arbitration to indemnify any members for losses sustained, shall be applied to the payment of the expenses of the association.

SECTION 4. The board of arbitration shall, from time to time, make or amend rules of procedure for the trial of such cases and the submission of arguments in cases referred to it for decision, as it may deem proper.

SECTION 5. Under any of the circumstances mentioned in section 3, the commissioner shall immediately issue instructions to the member or members charged with the violation, as he may deem advisable, pending action of the board of arbitration. If the member fails to comply with such order, the commissioner may take such steps for the protection of the association as he may deem advisable, with the approval of a majority of the executive board.

Article twenty-fourth.

SECTION 1. The expenses of the association shall be assessed upon the members *pro rata*, according to their gross revenue derived from the traffic covered by the agreement, each member to advance at the beginning of the year three hundred (\$300) dollars towards its proportion of the expenses.

Article twenty-fifth.

SECTION 1. This contract takes effect the — day of —, 1892, and shall terminate on the thirty-first day of July, 1893, and the fiscal year of the association shall terminate on the first day of April, 1893.

E. H.

4002 8 9 92. 800

THE ERIE & WESTERN TRANSPORTATION COMPANY.

ANCHOR LINE [Small Anchor] LAKE AND RAIL.

VIA ERIE AND

PENNSYLVANIA RAILROAD.

JOINT EAST-BOUND FREIGHT TARIFF, No. 11.

This Tariff of Rates is to be used in connection with, and subject to, the Official Classification and all Supplements thereto in effect at the time of shipment, including all Supplements and Special Rates issued by this Company respecting prohibited articles, &c.

TAKING EFFECT AUGUST 15th, 1892.

Subject to change without notice. Superseding Rates named in Tariff No. 9.

FROM CHICAGO AND MILWAUKEE.

		RATES IN CENTS PER 100 POUNDS.								
TO		1st Class.	2d Class.	3d Class.	4th Class.	5th Class.	6th Class—Hay (other than grain and its products).	Grain Products, as enumerated below* (50 lbs in bulk excepted.)	Wool in sacks, C. L.	Rags and Paper Stock (Waste and Scrap Paper) in bales, not chine compressed, C. L.
BOSTON,	Mass.	67	58	45	34	23	17	17	40	22
NEW YORK,	N. Y.	60	52	40	30	20	15*	15	35	20
PHILADELPHIA,	Pa.	58	50	38	28	18	13	13	33	18
BALTIMORE,	Md.	57	49	37	27	17	12*	12	32	17
ERIE and BUFFALO, . .		27½	24½	17½	15	10	10	10	10½	10

* Flour, Ship Stuff, Hominy, Groats, Screenings, Hulled Corn, Malt, Bran, Corn Flour, Pearl Wheat, Corn Meal, Buckwheat, Oat Hulls, Malt Apprants, Midlings, Cracked Wheat, Pearl Barley, Short, Ground Corn, Rye Flour, Malt Skimmings, Mill Feed, Grits, Oat Meal, Brown's Meal, Cracked Corn, Feed, sprouted Barley, Oil Meal, Oil Cake, Sugar Meal, Cotton-seed Meal; Cereals, in bags or sacks.

The established arbitraries must be added to above Rates to all points which take such established arbitraries.

J. C. EVANS, Agent, Chicago, Ill.

D. M. BRIGHAM, Agent, Milwaukee, Wis.

H. C. SHEPARD, Agent, Winona, Minn.

C. A. CLAWSON, Agent, Minneapolis, Minn.

S. B. GAULT, Northwestern Agent, St. Paul.

JOHN E. PAYNE,

WM. H. JOYCE,

E. T. EVANS,

Eastern Manager,

Gen'l Freight Agent P. R. R. Co.,

Western Manager,

Philadelphia.

Philadelphia.

Buffalo.

Philadelphia, August 11, 1892.

EXHIBIT C TO STIPULATION OF COUNSEL.

Standard Freight Tariff—Classes.

Per 100 pounds.															Per bbl.	Per 100 lbs.	Per 100 lbs.
Distance.	1	2	3	4	5	6	A	B	C	D	E	F	G	H			
<i>Miles.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>	<i>Cts.</i>			
5...	12	11	10	8	7	6	6	6	4½	3½	7	9	9	2½			
10...	16	14	13	10	9	8	8	8	5½	5	9	11	11½	3½			
15...	18	16	15	12	11	9	9	9	6	5½	11	12½	3½	10			
20...	20	18	16	14	12	10	10	10	7	6	12	14	5	12			
25...	22	20	18	16	13	11	11	11	7½	6½	13	15	5½	14			
30...	24	21	19	17	14	11	11	11	7½	6½	14	15	6	17			
35...	26	23	21	19	15	12	12	12	8	7½	15	16½	6½	19			
40...	27	24	22	20	16	12	12	12	8	7½	16	16½	6½	20			
45...	29	26	24	21	17	13	13	13	8½	8	17	17½	6½	21			
50...	30	27	25	22	18	13	13	13	9	8	18	17½	7	22			
55...	32	29	26	23	19	14	14	14	9	8½	19	18	7	23			
60...	33	30	27	24	19	14	14	14	9	8½	19	18	7½	24			
65...	35	32	28	25	20	15	15	15	9½	9	20	19	7½	25			
70...	36	33	29	26	20	15	15	15	9½	9	20	19	7½	26			
75...	38	35	30	27	21	16	16	16	10	9½	21	20	7½	27			
80...	39	36	31	28	21	16	16	16	10	9½	21	20	7½	28			
85...	41	37	32	29	22	17	17	17	11	10	22	21½	8	29			
90...	42	38	33	29	22	17	17	17	11	10	22	21½	8	29			
95...	44	39	34	30	23	18	18	18	11½	11	23	23	8	30			
100...	45	40	35	30	23	18	18	18	11½	11	23	23	8½	31			
110...	48	42	37	31	24	19	19	19	12	11	24	23	8½	32			
120...	51	44	39	32	25	20	20	20	13	12	25	24	8½	33			
130...	54	46	41	33	26	21	21	21	13	12	26	25	8½	34			
140...	57	48	43	34	27	22	22	22	13	13	27	26	9	35			
150...	60	50	45	35	28	23	23	23	14	13	28	28	9	36			
160...	62	52	46	36	29	24	24	24	14	13	29	29	9½	37			
170...	64	54	47	37	30	25	25	25	15	14	30	31	9½	38			
180...	66	56	48	38	31	26	26	26	15	14	31	31	9½	39			
190...	68	58	49	39	32	27	27	27	16	15	32	33	9½	40			
200...	70	60	50	40	32	27	27	27	16	15½	32	33	9½	41			
210...	71	62	51	41	33	28	28	28	17	16	33	34	9½	42			
220...	72	64	52	42	33	28	28	28	17	16	33	34	10	43			
230...	73	66	53	43	34	29	29	29	18	17	34	36	10½	44			
240...	74	68	54	44	34	29	29	29	18	17	34	36	10½	45			
250...	75	70	55	45	35	30	30	30	19	18	35	38	10½	46			
260...	76	71	56	46	35	30	30	30	19	18	35	38	10½	47			
270...	77	71	56	46	36	31	31	31	20	19	36	40	10½	48			
280...	78	72	57	47	36	32	32	32	20	19	36	40	10½	49			
290...	79	72	57	47	37	32	32	32	21	19	37	42	10½	50			
300...	80	73	58	48	38	33	33	33	21	19	38	42	11	51			
310...	81	73	58	48	38	33	33	33	21	19	38	42	11	52			
320...	82	74	59	49	39	34	34	34	21	20	39	42	11	53			
330...	83	74	59	49	39	34	34	34	22	20	39	44	11	54			
340...	84	74	59	49	39	34	34	34	22	20	39	44	11	55			
350...	85	75	60	50	40	35	35	35	23	21	40	46	11	56			
360...	85	75	60	50	40	35	35	35	23	21	40	46	11½	57			
370...	85	75	60	50	40	35	35	35	23	21	40	46	11½	58			
380...	88	76	61	51	41	36	36	36	25	23	41	50	11½	59			
390...	88	76	61	51	41	36	36	36	25	23	41	50	11½	60			
400...	88	76	61	51	41	36	36	36	25	23	41	50	11½	61			
410...	91	77	62	52	42	37	37	37	26	24	42	52	11½	62			
420...	91	77	62	52	42	37	37	37	26	24	42	52	11½	63			
430...	91	77	62	52	42	37	37	37	26	24	43	52	11½	64			
440...	94	78	63	53	43	38	38	38	27	25	43	54	11½	65			
450...	94	78	63	53	43	38	38	38	27	25	43	54	11½	66			
460...	94	78	63	53	43	38	38	38	27	25	44	54	12	67			

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

EXHIBIT C TO STIPULATION OF COUNSEL.

Standard Freight Tariff—Classes.

Distance.	Per 100 pounds.		Per ton.		Per car-load.			Per 100 pounds.
	J	K	L	M	N	O	P	
Miles.	Cts.	Cts.	\$ Cts.	\$ Cts.	\$ Cts.	\$ Cts.	\$ Cts.	Cts.
5	8	4	35	55	5 00	5 50	4 00	4
10	10	5	50	80	6 50	8 00	5 00	5
15	12	5½	55	85	7 50	9 00	6 00	5½
20	13	6	60	90	8 00	10 00	7 00	6
25	14	6½	65	95	9 00	11 00	8 00	6½
30	15	7	70	1 00	10 00	11 00	8 00	7
35	16	7½	75	1 05	12 00	12 00	9 00	7½
40	17	8	80	1 10	13 00	12 00	9 00	8
45	18	8	85	1 15	14 00	13 00	10 00	8½
50	19	8	90	1 20	14 00	13 00	10 00	9
55	20	8	95	1 25	14 00	14 00	10 00	9
60	21	9	95	1 30	14 50	14 00	11 00	10
65	22	9	1 00	1 35	15 50	15 00	11 00	10
70	22	9	1 00	1 40	16 00	15 00	11 00	11
75	23	9½	1 05	1 45	16 50	16 00	12 00	11
80	23	9½	1 10	1 50	17 00	16 00	12 00	12
85	24	9½	1 15	1 55	17 50	17 00	13 00	12
90	24	9½	1 15	1 60	18 00	17 00	13 00	13
95	25	10	1 20	1 65	19 00	17 00	14 00	14
100	25	10	1 20	1 70	20 00	17 00	14 00	14
110	26	10	1 25	1 80	21 00	18 00	14 00	15
120	27	10½	1 30	1 90	23 00	18 00	15 00	16
130	28	10½	1 35	2 00	24 00	19 00	16 00	17
140	29	11	1 40	2 10	25 00	19 00	16 00	18
150	30	11	1 50	2 20	26 00	20 00	17 00	18
160	31	12	1 60	2 25	27 00	20 00	17 00	19
170	32	12	1 70	2 30	28 00	21 00	18 00	19
180	33	12	1 80	2 35	29 00	21 00	19 00	20
190	34	13	1 90	2 40	29 50	22 00	19 00	20
200	35	13	2 00	2 45	30 00	22 00	20 00	20
210	36	13	2 10	2 50	31 00	23 00	20 00	21
220	37	14	2 20	2 55	31 50	23 00	21 00	21
230	38	14	2 30	2 65	32 00	23 00	21 00	21
240	39	14	2 40	2 65	33 00	24 00	22 00	22
250	40	15	2 50	2 75	33 50	24 00	22 00	22
260	41	15	2 60	2 75	34 00	24 00	22 00	22
270	42	15	2 70	2 85	34 50	25 00	23 00	22
280	43	16	2 80	2 85	35 00	25 00	23 00	23
290	44	16	2 90	2 95	36 00	25 00	24 00	23
300	45	16	2 95	3 00	36 50	26 00	24 00	23
310	46	17	3 05	3 10	37 00	26 00	24 00	23
320	47	17	3 05	3 20	38 00	26 00	24 00	24
330	48	17	3 15	3 30	38 50	27 00	25 00	24
340	49	17	3 15	3 40	39 00	27 00	25 00	24
350	50	17	3 28	3 50	40 00	27 00	25 00	24
360	51	17	3 28	3 50	40 00	27 00	25 00	24
370	52	17	3 28	3 50	40 00	27 00	25 00	24
380	53	18	3 41	3 60	41 00	29 00	27 00	26
390	54	18	3 41	3 60	42 00	29 00	27 00	26
400	55	18	3 41	3 60	42 00	29 00	27 00	26
410	56	19	3 54	3 70	44 00	31 00	29 00	28
420	57	19	3 54	3 70	44 00	31 00	29 00	28
430	58	19	3 54	3 70	44 00	31 00	29 00	28
440	59	20	3 67	3 80	46 00	33 00	31 00	30
450	59	20	3 67	3 80	46 00	33 00	31 00	30
460	60	20	3 67	3 80	46 00	33 00	31 00	30

(Here follows table marked p. 104½.)

105 *Extracts from Annual Report of the South Carolina Railway Company to the Railroad Commissioners of the State of South Carolina for the Year Ending June 30, 1892.*

Extract from page 31.

Gross earnings from operation.....	\$1,509,472	34
Less operating expenses... ..	1,049,535	50

Income from operation..... \$459,936 84

Deductions from income:

Interest on funded debt accrued.....	\$374,434	60
Interest on interest-bearing current liabilities accrued, not otherwise provided for.....	35,329	53
Rents.....	18,750	00
Taxes.....	49,902	36
Permanent improvements.....	32,499	90
Other deductions.....	7,500	00

Total deductions from income..... 5,184,163 39

Net income.

Deficit..... \$58,479 55

Extract from page 35.

Total passenger revenue.....	\$363,245	10
Mail.....	28,446	99
Express.....	23,241	46

Total passenger earnings..... 414,933 55

Total freight revenue..... 1,086,015 64

Total passenger and freight earnings..... \$1,500,949 19

Other earnings from operation:

Rents, not otherwise provided for.....	7,300	58
Other sources.....	1,222	57

Total gross earnings from operation, entire line. \$1,509,472 34

Extract from page 61.

Freight traffic:

Number of tons carried of freight earning revenue.....	794,845
Number of tons carried one mile.....	74,311,037
Average distance haul of one ton	93.49
Total freight revenue	1,086,015.64
Average amount received for each ton of freight...	1.36632
Average receipts per ton per mile.....	.01461

Estimated cost of carrying one ton one mile.....	00738
Total freight earnings.....	1,086,015.64
Total earnings per mile of road.....	4,022.28015
Freight earnings per train per mile.....	2.13061

106 Train mileage:

Miles run by passenger trains.....	596,919
Miles run by freight trains.....	509,719
Miles run by mixed trains.....	.....

Total mileage trains earning revenue.....	1,106,638
Miles run by switching trains.....	425,925
Miles run by construction and other trains.....	119,215

Grand total train mileage.....	1,651,778
Mileage of loaded freight cars—North or East....	3,968,464
Mileage of loaded freight cars—South or West.	3,038,127
Mileage of empty freight cars—North or East.....	1,124,792
Mileage of empty freight cars—South or West.....	2,142,166
Average number of freight cars in train.....	28
Average number of loaded cars in train.....	16
Average number of empty cars in train.....	12
Average number of tons of freight in train.....	101.50
Average number of tons of freight in each loaded car..	6.40

Hearing had December 11 and 12, 1895.

Trial of Cause.

This cause came up for hearing before the court on the 11th of December, 1895. The pleadings were read to the court and arguments were made by Mr. Northrop, on behalf of complainant, and by Mr. Baxter and Mr. Barnwell, on behalf of defendants, and by Mr. Northrop in reply, on behalf of complainant. The court took the case under advisement and thereafter rendered the following opinion:

Opinion and Decree.

THE UNITED STATES OF AMERICA, }
 District of South Carolina. }

In the Circuit Court, Fourth Circuit. In Equity.

H. W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD ET AL. }

This is a proceeding in equity brought to enforce a finding of the Interstate Commerce Commission, under section 5 of the act to amend an act to regulate commerce, approved March 2nd, 1889 (25 Statutes at Large, 855). This section 5 amends section 16 of the

amended act which was approved 4th February, 1887 (24 Statutes at Large, 379).

The petitioner is a resident of Summerville, an incorporated town on the line of the South Carolina Railway Company, about twenty-two miles from Charleston, South Carolina.

He complained that he had been compelled to pay upon a shipment of two car-loads of hay from Memphis to Summerville, twenty-eight cents per hundred, whilst the through-freight charge from Memphis to Charleston is but nineteen cents per hundred. He charged that this was in violation of section 4 of the act of 1887, the long and short haul clause. The commission heard the case on the petition and answers, decided in favor of the petitioner, and ordered the South Carolina Railway Company, then, and at the date of filing the petition, in the hands of a receiver, to reduce the rate from Memphis to Summerville to 19 cents. The defendant The

107 South Carolina Railway Company, by its receiver, has not obeyed the order.

The facts of the case are, the two car-loads of hay were shipped from Memphis, Tennessee, to Chattanooga, Tennessee; 310 miles over the Memphis and Charleston railroad from Chattanooga to Atlanta, Ga., 152 miles over the East Tennessee, Virginia and Georgia railroad; from Atlanta to Augusta, Georgia, 171 miles over the Georgia railroad; and from Augusta, Georgia, to Summerville, South Carolina, 115 miles. The through-freight charge from Memphis to Charleston is 19 cents. In addition to this, the petitioner paid nine cents. In the through-freight charge of 19 cents, all these railroads participate. None of them but the South Carolina railway had any interest in the nine cents. This is the rate of freight from Charleston to Summerville, approved by the railroad commissioners of South Carolina. All the railroads named are parties defendant. At the date of the transaction complained of, 17th August, 1892, the South Carolina Railway Company was in the hands of D. H. Chamberlain, receiver; the railway property was sold under foreclosure of mortgage in the proceedings in which he was appointed receiver, by D. H. Chamberlain as special master, he having been thereunto named. The sale was confirmed 24th April, 1894, the terms of sale complied with, the deed of conveyance executed shortly thereafter, to wit: 1st May, 1894, and the purchasers were put into possession, and afterward, the South Carolina and Georgia Railroad Company, under purchase from and conveyance by them, was put into absolute possession on 1st July, 1894. The cause was heard before the commission. Its decision was rendered 27th June, 1894. It was served on D. H. Chamberlain, receiver, some time in July, 1894. There is no evidence of any notice to or service on, or refusal or neglect to obey the order on the part of the South Carolina and Georgia Railroad Company, styled in these proceedings, the successor, assignee and purchaser of the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain.

At the threshold of the case, is a motion to dismiss these proceedings against the South Carolina and Georgia Railroad Company, for the want of this evidence above stated. As the testimony taken

in the cause develops, and it is not disputed, the other roads made defendants, had no contract or agreement for through rates from Memphis to Summerville. The rate was to Charleston, a competitive point. Nor did any of the roads other than the South Carolina Railway Company share in the nine cents, over the nineteen cents per cwt. This excess went to the South Carolina railway alone. This preliminary objection therefore is vital.

It is very clear that the South Carolina and Georgia Railroad Company did not become liable in these proceedings against the receiver of the South Carolina railway merely because it was the alienee of the purchaser at the foreclosure sale, or even were it the purchaser itself. (*Sullivan vs. Portland, &c.*, R. R. Co., 94 U. S., at page 610. *Hoard vs. Chesapeake and Ohio R. R. Co.*, 123 U. S., 222.) If it is so liable, the liability must arise from the terms of sale under which the purchase was made.

108 The petitioner relies upon the terms of the order of sale in the decree of foreclosure of the South Carolina Railway Company which are in these words:

"The purchaser or purchasers at said sale shall as part of the consideration and purchase price of the property purchased, take said property upon the express condition, that he or they or their assigns will pay, satisfy and discharge any unpaid compensation allowed to the receiver and all claims made against said receiver and all obligations contracted and obligations incurred by the receiver, or which may be contracted or incurred by the receiver prior to the delivery of the possession of the property sold to the purchaser or purchasers and which shall not have been paid by the receiver prior to such delivery of possession out of the income of the mortgaged property."

The language of this part of the decree clearly refers to pecuniary obligations. The purchasers are to pay, satisfy and discharge any unpaid compensation, all claims made against the receiver and all obligations of the receiver which shall not have been paid, &c.

The fifth section of the amended act (1889) amended section 16 of the amended act (1887) imposes no punishment, pecuniary or otherwise for disobeying the order of the commission. It does inflict a fine upon the offending party if it disobey the order of the circuit court of the United States, if the commission appeal to such court for assistance, and that court issue its injunction or other process commanding disobedience to the order of the commission to cease. But in such case the punishment is in the nature of a contempt proceeding and the party must be punished for his own act. It cannot be presumed that the South Carolina and Georgia have the same rates as the receiver had when he controlled the property. We cannot presume that this new company, wholly disconnected with the receiver, had adopted all his alienees. *Non constat* that it would disobey the commission if it were served with an order from it. Clearly the refusal of the receiver made nearly two months after the property had been conveyed, and nearly one month after the South Carolina and Georgia Railroad Company were in exclusive possession, in their own right, cannot bind that company.

The petition in this court avers "that the findings and conclusions of the commission in this case, together with a copy of the order and notice were delivered to each and all of the parties to the cause, their receivers and successors in operation."

On this averment it bases its prayer for temporary and permanent injunction against the South Carolina and Georgia Railroad Company, as successors in operation of the receiver. The evidence fails to establish this most material averment. So far as the South Carolina and Georgia railroad is concerned, and as to the South Carolina and Georgia Railroad Company, the prayer of the petition is *coram non judice*. The only ground of jurisdiction against the South Carolina and Georgia Railroad Company is that having been served with a copy of the order of the commission it refused
109 or neglected to obey it. The record discloses no such service, refusal or neglect.

But beside the South Carolina and Georgia Railroad Company there are other defendants. They have answered and have met the issue presented by the petition. The questions made are of deep interest and require solution.

The answer in which all the defendants join, except The South Carolina and Georgia Railroad Company, admits the hearing before the commission and the result, denies as well that it had the effect of a judicial decision, as its correctness in law or fact. It admits that the joint rate agreed upon between the defendants for hay, from Memphis to Charleston, is 19 cents per cwt., but it denies that there is anything more than an arrangement between independent companies, each of which has a specified and distinct interest in this rate. It denies that there is any agreement for a through rate to Summerville, South Carolina, from Memphis. It avers that this rate of 19 cents per cwt. is reasonable. That it is the result not only of competition between the roads charging it, but of competition at Charleston with other all-railroad routes, with rail and water transportation, and with all-water transportation. That the rate on hay to Summerville is made up of this 19 cents per cwt. through charge, which alone is divided between the defendants in definite proportions, and of nine cents per cwt. charged as a local rate on the South Carolina railroad between Charleston and Summerville. That the through rate greatly exceeds what the aggregate of local rates would be, and that the local rate of nine cents has the approval of the railroad commission of South Carolina, and that it is reasonable.

The controlling question in this case is: Have these defendants violated the provisions of the 4th section of the act of Congress approved 4th February, 1887? "An act to regulate commerce, 24 Statutes, 379, section 4: That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, but this shall not be construed as authorizing any common carrier within the terms of this act to charge

and receive as great compensation for a shorter as for a longer distance.

Provided, however, that upon application to the commission appointed under the provisions of this act, such common carrier may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property. And the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from operation of this section of this act."

The defendants did not avail themselves of this proviso, notwithstanding that the commission opened the door for them to do
110 so. So the question in this case is, Was this charge of 28 cents per hundred from Memphis to Summerville made by these defendants, and was it made under substantially similar circumstances and conditions as the charge of 19 cents per hundred from Memphis to Charleston, the distance from Memphis to Summerville being shorter than the distance from Memphis to Charleston, both Summerville and Charleston being on the same line and in the same direction?

It would appear from the evidence in this case that these defendants had no common controlling head, that they were independent of each other, and that, acting independently, they had so arranged their charges of freight on hay and articles of this character that 19 cents per hundred would be divided between them for transportation between Memphis and Charleston. They had similar contracts from Memphis to Chattanooga, to Atlanta, to Augusta. But these contracts did not include any intermediate points. In the case at bar all that was received by all these connecting roads was 19 cents per hundred. The South Carolina Railway Company shared in this. In addition, that this railway company charged nine cents because the shipment was to Summerville and this nine cents it shared with no one. Strictly speaking, therefore, the defendants did not charge for anything but transportation between Memphis and Charleston. There was no arrangement between them for any other through rate to any point in South Carolina than Charleston, and no authority in any one to change or enlarge the terms of the contract. Certainly the shipping agent in Memphis could not do it. He may very well have said to one who desired to ship hay into South Carolina, and who wished to avoid the local rates on each road, I can do this for you, we have through rates to competitive points. I can give you the benefit of the through rate to Augusta, or I can give you the through rate to Charleston. My authority goes no further. I can put your freight within reach of you on the South Carolina railway, and can bind this road, only as to the rate to Charleston. When you get it there you may contract with the South Carolina Railway Company. The South Carolina Railway Company itself could say to its contracting roads, We are perfectly willing to contract with you for a through rate to Charleston. There we meet competitive carriers and competing markets, and if we do not meet you in lowering the through rates you, and we as well, will lose

business. But we will not agree to through rates to points where we have no competition, and especially to points on our road. Freight to these points and charges for transportation are our own business, and no one else is concerned in it. The mandate of the commission, therefore, to these defendants, other than The South Carolina Railway Company, directs them to do that which it is out of their power to do, and is nugatory and void.

But if we assume, for the sake of argument, that all the defendants are affected by this charge, does it violate the 4th section of the act above quoted?

111 Judge Cooley, *In re L. & N. R. R. Co.*, 1 I. C. C. Reports, 57, says: "The charging or receiving greater compensation for the shorter than for the longer haul is sure to be forbidden only where both are under substantially the same circumstances and conditions. And therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated." This is quoted with approbation by the United States circuit court, southern district California, *Interstate Commerce Commission vs. A. F. & S. F. R. Co.*, 50 Fed. Rep., 295.

When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley in the same case answers this question. "Among other things in cases where the circumstances and condition of the traffic were affected by the element of competition and where exceptions might be a necessity if the competition were to continue. And water competition was beyond doubt, especially in view." In the case from 50 Fed. Rep. above cited, this is one of the rubrics: "Los Angeles, California, is a point to which there is active competition in certain kinds of freight between several transcontinental railway lines, direct or by water via Vancouver and San Francisco, also by ocean freights via Aspinwall and the straits of Magellan, from points east of the Missouri river, and a through rate on the same kind of freight, lower than to San Bernardino, an intermediate non-competitive point 60 miles from Los Angeles, on one of the competing railroad lines is not prohibited by the act, since the circumstances and conditions were substantially dissimilar."

The circumstances of the case at bar are closely like those of the case just quoted. Charleston is a competitive point between all-railroad routes, all-railroad routes partly by rail and partly by water, and routes all water. If the defendants had not consented with each other to lower the rate, no hay whatever would come from the hay-producing territory tributary to Memphis; and all the southeast Atlantic States would be compelled to rely on other portions of the West, North or Northeast for hay.

The evidence clearly shows that the rate to Charleston was forced down by this competition. But this is an advantage to all the territory tributary to Charleston, and all stations share in it. No such competition exists at Summerville, a small inland town. If it and others like it were permitted to share in the circumstances and con-

ditions surrounding Charleston and to get the benefit of the competition which Charleston enjoys, and they have not, then *ex necessitate* the South Carolina railway will be called upon to elect between its through business and its local business, and in this election to give up the former. Thus all stations on the line of road will pay local freight on hay and the market to the extent of imports from Memphis will be destroyed. The interstate commerce law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade.

The bill is dismissed.

CHARLES H. SIMONTON,

Circuit Judge.

22nd January, 1896.

I, J. E. Hagood, clerk of said court, do hereby certify that the foregoing is a true copy of the original now on file in this court.

Given under my hand and seal of said court, in the city of Charleston, S. C., this the 23rd day of January, A. D. 1896.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

[SEAL.]

Memorandum.

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit. In Equity.

HENRY W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE R. R. CO. ET AL. }

Memorandum.

Counsel have brought to my attention that in the opinion filed in this case it was stated that there was no evidence that a copy of the order of the Interstate Commerce Commission was delivered to the South Carolina and Georgia Railroad Company.

This was certainly my conviction at the hearing. It appears, however, from statements made since the hearing, that a registered letter was sent from the office of the secretary of the Interstate Commerce Commission some time in July, 1894, and delivered to the South Carolina and Georgia Railroad Company at Charleston. That this letter was received at the Charleston post-office July 9th, 1894, and delivered to one J. H. Williman, who is an agent of the railroad company, receiving letters for it. In this registered letter was a copy of the opinion and order of the Interstate Commerce Commission in this case, in which order are mentioned as defendants The South Carolina Railway Company, Daniel H. Chamberlain, receiver of the South Carolina Railway Company. The South Carolina and Georgia Railroad Company is not mentioned at all. This information has been furnished me since the opinion was rendered, and after the term at which the case was heard. Had

it been supplied to me in proper time it would not have affected my opinion.

CHARLES H. SIMONTON,
Circuit Judge.

17 April, 1896.

Filed April 17, 1896.

113 *Petition for Appeal.*

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

HENRY W. BEHLMER, Plaintiff,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL., }
Defendants. }

Petition for appeal.

To the honorable judges of said court :

Your petitioner Henry W. Behlmer, the complainant in the above-stated cause, respectfully represents that in the final decree of this court rendered in favor of respondents on the 22d day of January, 1896, there is manifest error committed to the injury of this petitioner.

Wherefore your petitioner prays an order granting an appeal from said decree to the United States circuit court of appeals for the fourth circuit.

CLAUDIAN B. NORTHPROP,
Attorney for H. W. Behlmer.

Allowed.

CHARLES H. SIMONTON,
Circuit Judge.

Filed 7th April, 1896.

Allowance of Appeal.

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

H. W. BEHLMER, Plaintiff,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL., }
Defendants. }

Allowance of appeal.

Now, to wit: on the 7th day of April, 1896, it is ordered that the appeal of the plaintiff in the above-stated case be allowed as prayed

for and that this case be certified to the circuit court of appeals for the fourth circuit, and that citation be issued returnable to said circuit court of appeals, on the 5th day of May, 1896, not exceeding thirty days from this date.

114 Let the appellant also enter, within ten days from this date, into bond, with at least two sureties to be approved by one of the judges of this court, in the sum of \$250.00, conditioned to pay all costs that may accrue on said appeal.

CHARLES H. SIMONTON,
Circuit Judge.

7th April, 1896.

Filed 7th April, 1896.

Assignment of Errors.

THE UNITED STATES OF AMERICA, {
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

HENRY W. BEHLMER

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL. }

Assignment of errors.

In this cause, being an appeal from the decree of the court in above stated case, comes the appellant, Henry W. Behlmer, by his solicitor, and charges and shows that there is manifest error to his injury in the record, and because thereof assigns the following grounds:

1. The court erred in holding that the South Carolina and Georgia Railroad Company is not bound by the order of the Interstate Commerce Commission, as the successor of D. H. Chamberlain, receiver of the South Carolina Railway Company.

2. The court erred in holding that an order of the Interstate Commerce Commission, a department of the Government, made in a proceeding to which the receiver was a party, was not binding upon the purchasers of the mortgaged property, it appearing the said order was served on the receiver prior to his discharge and by the terms of the decree of sale it was expressly made a part of the consideration that the receiver's obligations should be assumed by the purchasers and be binding on them and their successors.

3. The court erred in holding that there is no evidence of any notice to or service on or refusal or neglect to obey the order of the commission on the part of the South Carolina and Georgia Railroad Company, styled in these proceedings the successor assignee and purchaser of the South Carolina Railway Company and its receiver Daniel H. Chamberlain.

4. That the court should have held that the petition for the discharge of the receiver in the case of *Bound vs. The South Carolina*

Railway Company, filed of record in the United States circuit court for the fourth circuit, district of South Carolina, on the 24th day of October, 1894, in which it was stated that all claims which
 115 had come into the receiver's hands had been turned over to the purchasers of the road and assumed by them, was sufficient evidence that the South Carolina and Georgia Railroad Company had notice of and was served with the order of the commission, and that the admission in its answer was sufficient proof of its neglect and refusal to obey said order.

5. That the court erred in holding that the terms of the order of sale in the decree of foreclosure of the South Carolina Railway Company refers only to pecuniary obligations, but should have held that the receiver incurred the obligation of obeying all legal orders of the commission resulting from any proceedings to which he was a party, and that by the terms of sale the purchaser and his alienees assumed such obligations which were binding on them.

6. The court erred in not holding that the carriage of freight from Memphis to Summerville on a through bill of lading as one continuous haul in the same cars over the same rails owned by different companies does not constitute an arrangement for transportation subjecting the charge for the entire distance to the terms of the interstate commerce act.

7. The court erred in holding that formal contract for carriage between and from point to point, is necessary between the carriers in order to subject a charge for such entire haul to the operation of the act.

8. The court erred in not holding that as the roads received, forwarded and delivered on a through bill of lading and transported as one through shipment by a continuous carriage, freight from Memphis to Summerville, this constituted an arrangement within the terms of the act, and subjected them to its operation.

9. The court erred in holding that water competition, except between the point of shipment and the point of destination constituted a substantial dissimilarity of circumstances justifying a greater charge for the short haul without first obtaining an order from the Interstate Commerce Commission permitting such charge.

10. The court erred in holding that competition between roads subject to the act for freight moving to and from points where such roads intersect, constitutes a substantial dissimilarity of circumstances justifying a greater charge for the short haul to intervening points where such roads do not intersect, without an order from the Interstate Commerce Commission allowing such charge.

11. The court should have held that the existence of the so-called competing points made by the intersection of railroads at the will of the corporations owning such roads was no justification for a greater charge for the shorter haul.

12. The court erred in not holding that an aggregate charge of 25 cents per hundred for transporting hay and grain in car-load lots from Memphis to Summerville, a distance of 749 miles, is unreasonable in and of itself.

13. That the court erred in holding that competition of market

with market constituted such a dissimilar circumstance and condition as would relieve the carrier from the operations of the fourth section of the act on its own judgment in charging a greater rate for the shorter than the longer haul without first invoking the exercise of the discretion of the commission provided for in said section.

14. That the court erred in holding that the alleged competition between the all-rail lines running into Charleston was real and substantial, but should have held that actually no competition existed, for the reason that all the roads are admitted to belong to an association which fixes their rates.

15. That the court erred in holding that the evidence showed any real or substantial competition by water to Charleston as to hay or grain; but should have held that no actual competition by water exists, and that for years past the amount of hay and grain coming to Charleston by water, or via rail and water, is infinitely small and not of any controlling force or volume.

16. That the court erred in not holding that competition is excluded as a differentiating circumstance and condition in the fourth section of the act to regulate commerce.

17. That the court erred in not holding that as to competition of carrier with carrier, both being subject to the act, the circumstances and conditions are not presumptively dissimilar, and that the carrier, in all such instances, must first invoke the exercise of the discretion vested in the commission before charging a greater rate for the short than for the long haul.

18. That the court erred in not holding that the competition of market with market did not constitute dissimilar circumstances and conditions, and in not holding that in all such instances of competition the carrier should first invoke the discretion vested in the commission before charging a greater rate for the short haul than for the long haul.

19. That the court erred in not entering a decree ordering the defendants to pay to petitioner's counsel a reasonable fee.

20. That the court erred in not finding and granting a decree under the law and evidence in the case, enforcing the order of the Interstate Commerce Commission, as prayed for in the bill, and granting the injunction prayed for, restraining the defendants from violating and disobeying the order of the commission.

CLAUDIAN B. NORTHROP,

Att'y for H. W. Behlmer.

Filed April 7th, with petition for appeal.

117 *Citation.*

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

HENRY W. BEHLMER
vs.
 THE LOUISVILLE AND NASHVILLE RAILROAD CO. ET AL. }

Citation.

The United States of America to the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia and H. M. Comer, its receiver, as lessees of the Georgia railroad, the Memphis and Charleston Railroad Company, the East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as receivers of the two last mentioned roads, and the Southern Railway Company, the purchasers, assignees, and successor of said East Tennessee, Virginia and Georgia Railway Company, and the South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and the South Carolina and Georgia Railroad Company, the purchaser, assignee, and successor of the same, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond on the 5th day of May, 1896, next, pursuant to an appeal from a decree of the circuit court of the United States for the fourth circuit, district of South Carolina, rendered January 22nd, 1896, in your favor in a cause in said court wherein said Henry W. Behlmer was petitioner, and you were respondents, and to show cause, if any there be, why the decree rendered against the said Henry W. Behlmer, in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

CHARLES H. SIMONTON,
Circuit Judge.

Filed April 7th, 1896.

Service of a copy of within citation is hereby accepted as due and legal service of said citation.

April 10th, 1896.

JOS. W. BARNWELL,

118

AUGUSTA, GA., *April 10th, 1896.*

I accept service — citation of appeal by H. W. Behlmer *vs.* L. & N. R. R. Co. in U. S. court at Charleston.

JOS. B. CUMMING.

NASHVILLE, TENN., *April 9th, 1896.*

I hereby accept service of citation of appeal by H. W. Behlmer in case of H. W. Behlmer *vs.* L. & N. R. R. Co. in U. S. circuit court at Charleston.

ED. BAXTER,
*District Attorney.*WASHINGTON, D. C., *April 15, 1896.*

I acknowledge service of citation in Behlmer case.

W. A. HENDERSON.

Appeal Bond.

Know all men by these presents, that we, Henry W. Behlmer, as principal, and Geo. H. G. Behlmer and Julius D. Koster, as sureties, are held and firmly bound unto the Louisville and Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia, and H. M. Comer and R. Somer Hayes, its receivers as lessees of the Georgia railroad, the Memphis and Charleston Railroad Company, the East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink and Charles M. McGhee as receivers of the two last-mentioned roads and the Southern Railway Company, the purchasers, assignees and successors of said East Tennessee, Virginia and Georgia Railway Company and the South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and the South Carolina and Georgia Railroad Company in the full and just sum of two hundred and fifty dollars to be paid to the said above-mentioned obligees, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Scaled with our seals and dated this 7th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at a term of the United States circuit court for the fourth circuit, district of South Carolina, in a suit depending in said court between Henry W. Behlmer, plaintiff, and the said above-mentioned obligees, defendants, a decree was rendered against the said Henry W. Behlmer, and the said Henry W. Behlmer having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said obligees above named having been issued citing and admonishing them to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond on the day in the said citation mentioned.

Now, the condition of the above obligation is such, that if the

said Henry W. Behlmer, shall prosecute said appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

H. W. BEHLMER. [SEAL.]
GEO. H. G. BEHLMER. [SEAL.]
JULIUS D. KOSTER. [SEAL.]

Sealed and delivered in the presence of—
GEO. METZ.

Approved by—

CHARLES H. SIMONTON,
Circuit Judge.

Filed April 7th, 1896.

Clerk's Certificate.

THE UNITED STATES OF AMERICA, {
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records and proceedings and decree of the court, in the case of Henry W. Behlmer, complainant, vs. The Louisville & Nashville R. R. Co. *et al.*, defendants, together with the proceedings had in the cause relating to the same.

Given under my hand and the seal of the said court, at clerk's office, in the city of Charleston, S. C., and district of South Carolina, this 18th day of April, A. D. 1896.

[L. s.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

121 *Supplement to Transcript of Record.*

THE UNITED STATES OF AMERICA, {
District of South Carolina. }

In the Circuit Court. In Equity.

HENRY W. BEHLMER, Plaintiff, Appellant,
vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.,
Appellees. }

By stipulation of counsel the following extracts from the decree of the circuit court of the United States for the district of South Carolina, in the case of Bound vs. The South Carolina Railway Company *et al.*, are printed and filed as a part of the transcript of record in the above case.

CLAUDIAN B. NORTHROP,
Solicitor for H. W. Behlmer.
JOS. W. BARNWELL,
Solicitor for South Carolina and Georgia Railroad Co.

The purchaser or purchasers at said sale shall, as part of the consideration and purchase price of the property purchased, take the said property upon the express condition that he, or they, or their assigns, will pay, satisfy and discharge any unpaid compensation allowed to the receiver, and all claims made against the said receiver, and all obligations contracted and obligations incurred by the receiver, or which may be contracted or incurred by the receiver prior to the delivery of possession of the property sold to the purchaser or purchasers, and which shall not have been paid by the receiver prior to such delivery of possession out of the income of the mortgaged property, such claims and obligations so assumed, when duly established, to remain and constitute a fresh lien on the property so sold, in the hands of the purchaser or purchasers until fully paid and discharged: Provided, however, that

122 any claims on account of obligations and liabilities contracted or incurred during the receivership, which shall not have been presented to the receiver at the time of the delivery of the possession of the property, shall be presented for allowance within a period of sixty days after the first publication by the receiver of a notice to the holders of such claims to present such claims for allowance. The receiver shall publish such notice at least once a week for a period of four weeks on demand of the purchaser or purchasers, after the delivery of the possession of the mortgaged premises to the purchaser or purchasers at such sale; and any claims for obligations or liabilities contracted or incurred which shall not be presented for allowance within the period of sixty days after the first publication of such notice, shall not be enforceable against the said receiver or the said purchaser or purchasers, or against the mortgaged premises, the possession of which shall have been delivered as aforesaid to the said purchaser or purchasers.

* * * * *

The said purchaser or purchasers, or his or their successors or assigns, shall have the right to enter their appearance in this court, and he or they, and any of the parties to this suit, shall have the right to contest any claim or demand pending and undetermined at the date of the confirmation of such sale, or any claim or demand which may be presented at any time thereafter and prior to the expiration of the said sixty days, and shall have the like rights to contest any allowance which may be made after the entry of this decree, and shall have their right to appeal to the United States circuit court of appeals from any decision relating to such claim or claims or allowance according to the law and the practice of said court, and jurisdiction of this cause is retained by this court for the purpose of enforcing the provisions of this decree.

* * * * *

The receiver herein, on delivering over the property and premises to the purchaser or purchasers, or his or their successors or assigns, or as soon thereafter as practicable, shall also pay over and deliver to said purchaser or purchasers, to be held or treated by him or them as part of the mortgaged premises, all of the net income

arising from the mortgaged premises, as such income may appear on the final settlement of the receiver's accounts.

* * * * *

The said special master is hereby required promptly to make a full report of his proceedings touching the execution of the order of sale herein, and such supplemental reports as may be deemed necessary to fully show his action in the premises; and the court has the power to make such further orders in this cause and to give such further direction touching the sale herein ordered, and distribution of the proceeds thereof as may be by it deemed necessary.

* * * * *

123 Also the following, from the report of D. H. Chamberlain, special master :

* * * * *

The undersigned, special master, appointed to make sale of the property and franchises of the South Carolina Railway Company under the decree of this honorable court, filed November 23d, 1892, and certain decrees supplemental thereto, now has the honor respectfully to report touching his execution of said decrees, as follows :

First. That in accordance with the terms of said decree, and certain decrees supplemental thereto, he advertised the property and franchises of the said South Carolina Railway Company to be sold on the 12th day of April, A. D. 1894, at 11 o'clock a. m., at the principal offices of the said company, corner of King and Ann Sts., in the city of Charleston, for six successive weeks prior to the said 12th day of April, A. D. 1894, in the *News and Courier*, a newspaper published in the city of Charleston, S. C., also in the *New York Evening Post*, a newspaper published in the city of New York, N. Y.; also in the *State*, a newspaper published in the city of Columbia, S. C., and in the *Waterce Messenger*, a newspaper published in the city of Camden, S. C.; said advertisement stating the time and place of the sale, and containing a brief description of the property to be sold, and referring to said decrees for further particulars; that he files herewith a copy of each of said advertisements in each of said newspapers, respectively, as Exhibit "A" to this report.

Second. That in accordance with the requirement of said decree (folios 51 and 52) he duly filed with the clerk of this court his bond, with surety, approved by this court, in the penal sum of one hundred thousand (\$100,000) dollars, with the condition for the faithful performance of the duties imposed on him in such decree as such special master.

Third. That on the 12th day of April, A. D. 1894, at the time and place designated in said decrees and advertisement, he offered for sale, under the terms of said decrees the property and franchises of the said South Carolina Railway Company, as set forth in said decrees and advertisements, and thereupon, through H. H. De Leon, Esquire, as auctioneer, the property was cried for sale, and bids called for and received;

That in accordance with the terms of said advertisement, Wheeler H. Peckham, Esquire, of New York city, presented to the special master a duly certified check upon the Union National Bank of New York City for one hundred thousand (\$100,000) dollars, payable to said Wheeler H. Peckham, and by him endorsed to the order of the special master, which check was accepted by the special master, and thereupon the said Wheeler H. Peckham offered a bid of one million (\$1,000,000) dollars for the said property and franchises;

That no other bid being offered, the property was struck off and declared sold to said Wheeler H. Peckham for the sum of one million (\$1,000,000) dollars.

124 That thereupon the said Wheeler H. Peckham announced to the special master that he had made the bid and purchased the said property and franchises as attorney for Henry W. Smith, Gustave Kissel and Peter Geddes, their survivor or survivors.

April 13th, 1894.

* * * * *

Also the following extracts from petition of D. H. Chamberlain for discharge as receiver, filed 4th October, 1894:

"That on the 12th day of May, 1894, your petitioner turned over and delivered to the purchaser—the South Carolina and Georgia Railroad Company—all said property and assets which had been in his hands. * * *

"That all the claims against the receiver, and all obligations incurred by him, were duly turned over by your petitioner to said purchaser for payment on said 12th day of May, 1894; and that your petitioner has heretofore remained in his office of receiver for the purpose of adjusting and securing due payment and adjustment of all the claims and obligations of said receiver; and your petitioner now reports that each and all of said valid claims and obligations have been paid or assumed by the said purchaser and are in due process of settlement and payment, and that merely a nominal amount of such claims and obligations now remain unpaid, all of which claims and obligations are delayed by causes that will speedily be removed."

Also the following extract from the order of discharge, filed November 6, 1894:

* * * * *

"Ordered, That the prayer of the petition be granted, and that the said D. H. Chamberlain be discharged finally from all duties, liabilities or responsibilities as receiver, in this cause, except so far forth as respects the use of his name in all pending suits in which said receiver is plaintiff or complainant, which said suits shall be continued by the said receiver for the use of the persons interested therein upon his proper costs being assured to him."

125 On the same day, to wit, April 20, 1896, the appearance of

Claudian B. Northrop, Esquire, is entered for the appellant, and the appearance of Ed. Baxter, W. A. Henderson, J. W. Barnwell, and Joseph B. Cummings, Esquires, are entered for the appellees.

At the May term, 1896, of the said circuit court of appeals, to wit, on May 28, 1896, the said cause came on to be heard on the transcript of the record, and was argued by counsel and submitted.

At the November term, 1897, of the said circuit court of appeals, to wit, November 3, 1897, the court here announced and filed its opinion, which is as follows, to wit :

126

Opinion.

Filed Nov. 3, 1897.

United States Circuit Court of Appeals, Fourth Circuit.

HENRY W. BEHLMER, Appellant,	} No. 173. Appeal from the Circuit Court of the United States for the District of South Carolina.
<i>vs.</i>	
THE LOUISVILLE & NASHVILLE RAIL- road Company <i>et al.</i> , Appellees.	

(Argued May 28, 1896 ; decided November 3, 1897.)

Heard by Goff, circuit judge, and Hughes and Morris, district judges.

C. B. Northrop, counsel for appellant ; Ed. Baxter, W. A. Henderson, J. W. Barnwell, J. B. Cumming, J. E. Burke, counsel for appellees.

GOFF, *Circuit Judge* :

On the 27th day of June, 1894, the Interstate Commerce Commission entered an order requiring the appellees to cease and desist on or before the 15th day of July, 1894, and thenceforth abstain from charging, demanding, collecting or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by and under the circumstances and conditions similar to those appearing in this case from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than

127 that contemporaneously charged and received for the transportation of hay and such other commodities for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. Such order was entered as the result of the hearing of the petition that had been theretofore filed before such commission, by the appellant, Henry W. Behlmer. In his complaint so filed he alleged in behalf of himself and other merchants and residents of Summerville, that the defendants were charging an unreasonable and excessive rate of 28 cents per 100 pounds on hay in car-load lots, from Memphis to Summerville ; that Summerville is an incorporated town of considerable size and importance, situated on the South Carolina railway, in the State of South Carolina, and twenty-two miles inland from the city of Charleston ; and that said rate of 28 cents per 100 pounds is 9 cents per 100 pounds greater than the defendants charge and receive for transporting hay in car-loads from Memphis through Summerville to Charleston,

and that such greater charge constituted a violation of the long and short haul clause of the interstate commerce act; that said rate of 28 cents to Summerville was equal to the rate of 19 cents in force on hay in car-loads from Memphis through Summerville to Charleston, with the local rate of 9 cents per 100 pounds charged over the South Carolina railway, for carrying hay from Charleston back to Summerville; and that the 9-cent local rate which the complainant was forced to pay, in addition to the through Charleston rate, in order to get hay transported from Memphis to Summerville, was unreasonable and excessive; that the petitioner carried on a wholesale hay and grain business in said town of Summerville, and was thus 22 miles nearer than Charleston to the western points where grain shipments originated; that the petitioner received at Summerville two car-loads of hay ordered by him and shipped to him from Memphis, Tennessee, which hay was so transported to him from Memphis to Chattanooga, 310 miles, by and over the lines of the Memphis & Charleston R. R., thence to Atlanta, Georgia, 152 miles, by the lines of the East Tennessee, Virginia & Georgia R. R., thence to Augusta, Georgia, 171 miles, over the lines of the Georgia R. R., thence to Summerville, 115 miles, over the lines of the South Carolina Railway Co.; that the defendants were common carriers under a common control and management, for continuous carriage or shipment, and were engaged in the transportation of passengers and property wholly by railroad, between the points mentioned. Also that the two car-loads of hay referred to were hauled from Memphis to Summerville over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions as was the Charleston traffic; that the haul from Memphis to Summerville was twenty-two miles shorter than the haul from Memphis to Charleston, and that such shorter distance was included in the longer distance; that the petitioner was forced to pay 28 cents per 100 pounds on said shipment to Summerville, the shorter distance, when the rate to Charleston, the longer distance, was 19 cents per 100 pounds; that the petitioner was thereby obliged to pay \$56.00 in the aggregate as freight on the two car-loads of hay from Memphis to Summerville, when the same shipment would have been made by the same roads, over the same rails, in the same direction, to Charleston, a greater distance of twenty-two miles, for a less sum, to wit: \$38.00 in the aggregate. The petitioner further alleged that the local rate of 9 cents per 100 pounds for twenty-two miles, as also the aggregate charge of 28 cents per 100 pounds, from Memphis to Summerville, was excessive and unreasonable, and, therefore, in violation of the act to regulate commerce. It was further alleged by the petitioner that all of the railway lines mentioned in the petition and made defendants in said proceedings were members of the Southern Railway & Steamship Association, and that the discrimination and excessive rates against Summerville existed not only on hay, but on all other articles of interstate commerce coming to that place, greatly to the detriment and disadvantage of that town, and to the business of its merchants. The petitioner

prayed that the notice required in such cases issue to said railroad, and that the Interstate Commerce Commission would order that the defendants cease from violations of the law in the particulars mentioned, and for such other and further relief as the commission might think proper.

The notice issued and the defendants duly appeared and filed their answers. The joint answer of the receivers of the East Tennessee, Virginia & Georgia Railway Co. and of the Memphis & Charleston R. R. Co. admits that such companies are subject to the act to regulate commerce, and in effect that the shipment of hay took

129 place as set forth in the petition, but it was not admitted therein that the rates specified constituted a violation of the law, and proof of the same was demanded. The answer of the lessees of the Georgia R. R., as also the answer of the receivers of the South Carolina Railway Co., are in substance the same. Concerning the petitioner's allegations of a violation of the fourth section of the interstate commerce act, the answers make the following averments, in substance: That the Georgia R. R. Co., and the other carriers complained against have no joint through tariff from Memphis to Summerville, and that, therefore, they have no "line" in the sense of said section, from Memphis to Summerville, on which that section can operate; that the transportation of the two car-loads of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, for the reason that Summerville is a local station on the South Carolina railway, not on any water route, and that enterprise and capital has not constructed more than one railroad to it; that consequently it has not the advantage of competition of carriers, as the said railroad on which it is located is not compelled by competition to choose between a reasonable rate and a rate which is much below what is reasonable; and at Charleston there exists competition with numerous other all-rail routes between Memphis and that city, eight of which are mentioned by name, and the lines composing the same set forth in detail. The claim was made by the defendants in their answers that all such lines were actual competitors for business from Memphis to Charleston; that Charleston was a port on the Atlantic coast, easy of access for vessels from Baltimore, Philadelphia, New York, Boston and other eastern ports from which hay is shipped by water; that if the railroads running from Memphis to Charleston charged rates to all places as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be shipped from Memphis to Charleston, but the latter city would be supplied with hay from the North Atlantic ports, and said railroads would not only be deprived of such business, but that Memphis would lose the hay market; that
130 the rates on western produce to Charleston and other coast cities are made with a view to actual existing water competition; that western produce such as grain and hay can be shipped from Chicago to Charleston, through the ports of New York, Philadelphia or Baltimore, over continuous water routes

by the lakes and canal, or over combined rail and water routes; that the all-rail lines seeking to do business between Chicago, Charleston and the coast cities, are compelled to make their rates approximate those offered by the continuous water route or the combined rail and water routes; that the all-rail routes make their rates as much higher as the difference in services will permit, and those rates are correspondingly adjusted from all western points such as Evansville, Cairo, St. Louis and Memphis, the present all-rail rates on hay per 100 pounds being as follows: From Chicago, 33 cents; from St. Louis, 28 cents; from Louisville, Evansville and Cairo, 23 cents; from Memphis, 19 cents. The defendants claimed, therefore, that the rate from Memphis to Charleston on hay was forced upon their lines by actual existing water competition as well as by other additional competition beyond their control; that the controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston, or the lake transportation from Chicago to Buffalo or other lake ports, thence by rail to New York, and thence by ocean to Charleston, or rail transportation from Chicago to Baltimore, Philadelphia or New York, and thence by ocean to Charleston.

The case being at issue upon the complaint and answers—the testimony having been duly taken—the same was, after argument by counsel, duly submitted to the commission, which directed the order to the appellees hereinbefore referred to, and, as required by law, it caused a properly authenticated copy of its report and of its findings of fact and conclusions thereon, together with a copy of said order, to be delivered to each and all of the parties to said cause, their receivers and successors in operation.

The defendants to said proceeding before the Interstate Commerce Commission having failed and refused to obey such order, the said Henry W. Behlmer filed his petition, as he was authorized by the interstate commerce law to do, in the circuit court of the United States for the district of South Carolina, in which the action

131 had before the commission was fully set out, and the refusal of the defendants therein to comply with what he charged to be the lawful order of the commission was alleged, and the prayer was made that an order be entered granting to the petitioner a writ of injunction restraining the defendants, their officers, servants and attorneys from continuing in their violation and disobedience to said order of the Interstate Commerce Commission; and that finally, an order and decree be issued restraining the said defendants, and each of them, and their officers, servants and attorneys, from further violating or disobeying the requirements of said order of the commission, and decreeing permanent obedience to the same, together with such further and additional orders as are usually entered under such circumstances.

The court below, on the 2nd day of November, 1894, directed that the defendants appear and answer said petition, and show cause, if any they could, why the prayer of the same should not be granted. In the same order, it was provided that the defendants be restrained and enjoined, until the further order of the court,

from charging, collecting or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities, carried by them under circumstances and conditions similar to those in this case, from Memphis, in the State of Tennessee, to Summer-ville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and such other commodities, respectively, for the longer distance from Memphis to Charleston, and also the South Carolina & Georgia R. R. Co. was restrained and enjoined from imposing, charging and collecting the added local of 9 cents in addition to the through rate of 19 cents to Charleston.

The case was duly matured and came on to be finally heard on the 11th day of December, 1895, when after argument the court took the same under advisement, and afterwards, on the 22nd day of January, 1896, entered a decree dismissing the bill. From this decree the petitioner appealed.

At the time of the institution of the proceedings before the Interstate Commerce Commission the South Carolina Railway Co. was represented by Daniel H. Chamberlain, its receiver, who was made a defendant, and who filed his answer to the petition. The 132 proceedings were instituted in December, 1892, and the order of the commission issued on the 27th day of June, 1894, but prior thereto, on April 12, 1894, the South Carolina Railway Co. was sold by virtue of a decree of the circuit court of the United States for the district of South Carolina, entered in the cause of *Bound vs. South Carolina Railway Co. et al.*, in which said cause the said Daniel H. Chamberlain had been appointed such receiver. On the 12th day of May, 1894, the purchaser of said property under said foreclosure sale conveyed the same to The South Carolina & Georgia R. R. Co., a defendant herein. That company moved the court below to dismiss these proceedings, so far as it was concerned, for the reason that there was no evidence before the court of any notice to, or service of the same upon said company, of the institution of this action before the Interstate Commerce Commission, nor any evidence of any refusal or neglect by it to obey the order of the commission. The court below was of opinion that there was no evidence of the service of the commission's order on the South Carolina & Georgia Railway Co., nor of its refusal or neglect to obey the same, but as there were other defendants as to whom it was necessary to dispose of the questions raised, the court proceeded to a decree concerning the same.

The petition filed in the court below avers that the findings and conclusions of the commission in the matter of the petition filed before it by the appellant, together with a copy of the order and notice, were delivered to each and all of the parties to the cause, their receivers and successors in operation. We think the evidence sufficiently sustains these allegations. The South Carolina Railway Co. had due notice of the proceedings before the commission, and filed its answer through its receiver, and it plainly appears that a registered letter was sent from the office of the secretary of the commission in July, 1894, and duly delivered at Charleston to the suc-

cessor of said South Carolina Railway Co.—the South Carolina & Georgia R. R. Co.—which contained a copy of the opinion and order of the Interstate Commerce Commission made and filed in the matter of said petition. That such copy was received by the South Carolina & Georgia R. R. Co. is not doubted, and the point
 133 relied upon by that company in its motion to dismiss made in the court below was that the name of the South Carolina & Georgia R. R. Co. is not mentioned in said order and opinion, and the further fact that said company was organized after the date when such order and opinion were made and filed. In our judgment this position of the South Carolina & Georgia R. R. Co. is without merit. So far as the questions involved in this controversy are concerned, we think it had sufficient notice, and in fact that it was bound by the notice served upon and the answer filed by the receiver of the South Carolina Railway Co. The petitioner in his complaint filed with the commission charged the South Carolina Railway Co. and its receiver with unlawfully charging an unreasonable rate of freight on certain articles transported over its line and other lines with which it had traffic arrangements, and the commission, after full investigation, found that the petitioner's allegation was true, and ordered that said road and the others connected with it cease, on or before July 15, 1894, to make such unlawful charges. We are utterly unable to agree with the contention that such order of the commission was rendered absolutely nugatory, within a few days after it was issued, by the mere fact that the name of one of the railroads mentioned therein had in the meantime been changed, while the traffic arrangements theretofore in existence were still in force. To so hold would render it impossible for any petitioner to obtain relief in cases similar to this, and would in fact prevent the commission from enforcing its lawful orders. The Supreme Court of the United States in the case of *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290, 309, in effect decides this point in the manner we have indicated when it says in substance that if by the mere dissolution of the association originally proceeded against the suit abates, that then defendants have thereby discovered an effectual means to prevent the judgment of the court being given on the question really involved in the case.

We do not think it essential to the decision of this case to further consider the argument of counsel relating to the pecuniary liability of the purchaser or property sold under foreclosure decree, nor of the responsibility of such purchaser for contracts made by the receiver prior to such sale, as, in our judgment, the propositions of law therein involved are not applicable to the facts
 134 and circumstances of this case. We conclude that the court below had jurisdiction of the parties and of the subject-matter involved, and such being the case, it was its duty as a court of equity to make both its jurisdiction and its remedy effectual for perfect relief, if it found the allegations of the petition to be true.

This brings us to the real question in this case, and that is, Have these defendants violated the provisions of the fourth section of the

act of Congress, approved February 4, 1887, entitled "An act to regulate commerce"? (24 Statutes at Large, 379.) That section reads as follows:

"SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distance for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

We find this case, so far as the fourth section is involved, to be quite similar to the case of *Cin., N. O. & Tex. Pac. Railway v. Int. Com. Com.*, 162 U. S., 184, commonly known as "*The Social Circle case.*"

That the appellees, in transporting the hay and other property mentioned in the petition filed in this cause, and in establishing the rates on the same from Memphis to Charleston, and from Memphis to Summerville, were engaged in such transportation under a common management for continuous carriage or shipment, within the meaning of that language as used in the act to regulate commerce,

is, we think, without doubt, and therefore it follows that it
135 was within the jurisdiction of the Interstate Commerce Commission to ascertain whether, in charging a higher rate for a shorter than for a longer distance over the same line in the same direction—the shorter being included within the longer distance—the appellees were transporting such property under substantially similar circumstances and conditions. The appellees alleged, both before the commission and the court below, such substantial dissimilarity of circumstances and conditions as justified them in making the greater charge for the shorter haul complained of in the petition, and upon them was the burden of showing affirmatively that such circumstances and conditions were in fact substantially dissimilar. The commission, in ascertaining the facts, found against this claim of the railroad companies and entered the order, the enforcement of which was the object of the petition filed by the appellant. The circuit court, however, on hearing the matters involved, sustained the claim of the appellees and refused to enforce the order of the commission.

The appellees claim that the substantial dissimilarity in the circumstances and conditions under which they transport property from Memphis to Charleston, and from Memphis to Summerville,

is created by: 1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all-water lines, or by all-rail lines, or part rail and part water routes. 2. The competition of all-rail lines between Memphis and Charleston.

The decisions of the Interstate Commerce Commission, concerning the proper construction of this fourth section of the commerce act, have not been uniformly sustained by the decrees of the courts of the United States in cases instituted for the purpose of enforcing the orders of the commission concerning that section, and, therefore, prior to the announcement of the opinion of the Supreme Court in the *Social Circle* case there was much confusion concerning the true meaning of the same. A careful reading of that opinion impels us to the conclusion that the construction given that section by the Interstate Commerce Commission, in a number of cases decided by it prior to such decision, is the proper one. In this connection may be cited the following: *The James & Mayer*

Buggy Co. v. The Cin., N. O. & Tex. Pac. R. Co. et al., 3
136 Inters. Com. Rep., 682; *Ga. R. R. Co. v. Clyde S. S. Co.*, 4
Inters. Com. Rep., 120; *Chattanooga Board of Trade v. East Tenn., V. & G. R. Co.*, 4 Inters. Com. Rep., 213. Such being our conclusions, we have now to determine whether or not the facts found by the commission are supported by the evidence taken in this case, or, in other words, whether or not the circumstances and conditions attending the transportation of hay from Memphis to Charleston, and from Memphis to Summerville, are so dissimilar as to justify the rates charged, respectively. Does the competition set up by the appellees as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions within the meaning of the said fourth section of the act to regulate commerce? Did such competition in fact affect rates between Chicago, the North Atlantic ports and Charleston? We are of the opinion that it was not of controlling force; that it was not such effectual competition as would constitute the dissimilar circumstances and conditions which would justify the commission, upon application to it, in authorizing the carrier to charge less for the longer than for the shorter haul. We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic from any particular locality, unless one line could perform the service if the other did not. Such we believe to be the true meaning of said fourth section, so far as the point we are now considering is involved. We are also of opinion that the competition claimed by

the appellees to exist between the different markets—particularly those of Memphis, Chicago, and the North Atlantic ports—to supply the trade of Charleston in the products mentioned, is not in reality the competition that affects rates from a particular locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character and not connected with the usual conditions under which transportation is conducted, nor does such competition in our judgment create the dissimilar circumstances and conditions referred to in the fourth section of the act now under consideration. And we further hold that competition between carriers subject to the requirements of said act does not produce such substantial dissimilarity in the circumstances and conditions under which transportation is performed as will justify such carriers in making a greater charge for the shorter than for the longer haul, without an order to that effect from the commission, granted by it as provided for in the proviso to the fourth section.

It is fair to presume that if the facts in any given case justify departure from this rule, the commission will, on a proper showing, grant the relief asked for, and make such exceptions as the circumstances suggest as proper, and justice to the carrier as well as the shipper, demands. If the carriers were permitted to determine such questions, the conflicting results produced by opposing interests would not only cause confusion, but work great injury in many cases to the shippers, to localities, and also to certain lines of business that would be affected thereby. If the competition of markets, or of carrying lines, subject to the provisions of the commerce act, justify carriers in making greater short-haul and lower long-haul charges, over the same line, without an order from the commission, issued after due investigation, then the unjust rates for transportation existing when that law was enacted, and which it was intended should be prohibited by it, will continue to be imposed and collected, and schedules shall be made, announced and maintained, to the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others. This statute was intended to prevent any and all kinds of discrimination in favor of localities, individuals or corporations, and to put all shippers on the same footing—that of perfect equality.

The rate from Memphis to Charleston on hay and grain, and like products, is reasonable, and is shown by the evidence to be remunerative; it is fair to presume that it would not have been made by the railroads, unless those controlling them were satisfied that it would be so, and, consequently, to justify the higher charge for the shorter haul to Summerville, which, we have found was made under substantially similar circumstances and conditions, the commission, after application to it for that purpose, must find certain reasons for the same, after due investigation, that may in fact exist, but which, we are compelled to say, are not now disclosed by the record before us. In the light of the act to regulate commerce, and keeping in view the theory upon which it was constructed, it is not difficult to understand why application was

not made to the commission for permission to charge less for the longer haul to Charleston than for the shorter haul to Summerville, when the rate proposed was 19 cents per 100 pounds for the longer and 28 cents per 100 pounds for the shorter.

The appellees contend that the smaller charge for the greater distance is, in this case, of great importance to the city of Charleston, as well as to the section of country adjacent thereto, as by means thereof the merchants of that city are enabled to build up a trade that otherwise would be lost to them. That may be true, but is not the same argument applicable to Summerville and other interior cities along the lines of the roads operated by the appellees between Charleston and Memphis? In order to build up one locality, we should not tear down many others; and justice to one section should not be purchased at the expense of another.

It should be kept in mind that the petitioner does not ask that the rate from Memphis to Charleston be changed—that it shall be made less and, consequently, unremunerative, or increased, and thereby cause the loss of the traffic—but only that the rate from Memphis to Summerville shall not be greater than the rate to Charleston.

Finding the facts to be as above indicated—substantially as found by the Interstate Commerce Commission in the proceedings instituted before it by the appellant—and construing the law as we do, it follows that the order issued by said commission to the appellees was a lawful order, of which they had due notice, and which it was and is their duty to obey and respect.

We do not find it necessary to consider and dispose of the questions raised in the pleadings and argued by counsel, concerning
139 the Southern Railway and Steamship Association, nor the matter of the added local charge of 9 cents from Charleston to Summerville, otherwise than it may be involved in the through rate to Summerville.

The decree of the court below dismissing the bill is reversed, and this cause is remanded to said court with instructions to enter a decree herein, requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. Said court will also see that the requirements of said decree are immediately carried into effect, and enforced, as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

Reversed and remanded.

MORRIS, *District Judge* :

I am unable to join in the order reversing the decree of the circuit court, which it is proposed to pass in this case, and will very briefly state my reasons :

Behlmer, in his petition to the commission, complained that he was charged as freight on two car-loads of hay from Memphis to Summerville at the rate of twenty-eight cents per hundred, while the rate over the same roads to Charleston, twenty-two miles farther, was only nineteen cents. This, he alleged, was a violation of the fourth section of the interstate commerce act. He further complained that the nine cents additional per hundred charged to Summerville was based on the local rate for twenty-two miles from Charleston back to Summerville over the South Carolina railroad, which itself, he alleged, was excessive and unreasonable, and he further alleged that the combined rate of twenty-eight cents
140 from Memphis to Charleston was excessive and unreasonable and in violation of the first section of the act.

The defendants answered, alleging that there were eight all-rail routes which were competitors for the business from Memphis to Charleston ; that there was besides existing water competition from ports on the Atlantic coast to Charleston ; and that the rate from Memphis to Charleston of nineteen cents per hundred was forced upon the defendant lines by this rail and water competition which they had to meet at Charleston, but which the South Carolina railroad did not have to meet at Summerville, and that rates which were just and reasonable to Summerville would result in the loss of the business if charged to Charleston.

The commission considered only the allegation that the defendants violated the long and short haul clause, and in view of their decision on that point deemed it unnecessary to consider whether any other provision of the law had been violated.

In the decision of the commission appears the following :

"There is no showing in this proceeding of competition by lines not subject to the act to regulate commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be carried to Charleston by various rail and water or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the commission for relief under the proviso clause of that section, but for the reasons stated in our decisions of the cases above cited they do not justify carriers in departing from the rule of the fourth section without such relieving order. Water competition to justify lower long-haul rates must exist between the point of shipment and the longer-distance destination. One transportation cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone, if the former did not undertake it. The compe-

141 titution of markets or the competition of carrying lines subject to regulation under the act to regulate commerce does not justify carriers in making greater short-haul or lower long-haul charges over the same line, without an order issued by the commission on application therefor after investigation."

The decision then quotes the rule of practice of the commission with reference to applications under the proviso of the fourth section, and then proceeds:

"Because Charleston is an important seaport and railroad centre, and hay may be and is carried there from various points, is not a sufficient reason for a departure from this rule. The just interests of the carrier are fully protected by the proviso clause of the fourth section. The defendants are under no obligation to compete at low rates for the carriage of hay from Memphis to Charleston. They ought not to engage in such competition, if the rates obtainable are not remunerative. If they are remunerative, the defendants cannot, in the face of the prohibition of the 4th section, and the provision in that section for the issuance of relieving orders, assume to say that such rates, though profitable on Charleston traffic, are insufficient for the transportation of car-load quantities to a shorter point on the same line and in the same direction."

There was no finding of fact by the commission other than is contained in the foregoing extract from its decision, and it is obvious that the commission did not pass upon the question of the dissimilarity of the circumstances and conditions, nor upon the question whether the rate for the shorter haul was of itself reasonable and just. They took the law to be that by charging a greater rate for the shorter haul over the same line, the carriers were *prima facie* without justification, and that they could only be permitted lawfully to make the charge after they had been authorized upon application to the commission under the proviso of the 4th section. One of the cases cited by the commission in support of this proposition of law is the decision of the circuit court of appeals in *Int. Com. Com. vs. Cin., N. O. & Tex. Pac. Ry*, now known as the "*Social Circle case*."

The Supreme Court, in reviewing that case (162 U. S., 184-194), did not approve such a hard and fast rule, but held in that case that

142 as the commission had found as a fact that the circumstances and conditions were not so dissimilar as to justify the rates charged, and as the circuit court of appeals had approved that finding, the Supreme Court would not disturb it. But in the case known as the "*Import case*," 162 U. S., 197, the Supreme Court held, in deciding a similar question, that it was error for the commission not to consider an existing competition which affected rates, and the fact that rates had to be reduced in order to secure freight, which otherwise would go by other routes, was one of the circumstances and conditions which must be considered before substantial similarity could be determined.

It may be fairly said, therefore, that the commission failed to consider one of the circumstances without which it could not arrive at a just finding. *Tex. Pac. R'way v. Int. Com. Com.*, 162 U. S., 197-

238; *Int. Com. Com. v. The Alabama Midland R'w'y Co.*, et. et. of apps., 5th circuit; *Int. Com. Com. v. L. N. R. R. Co.*, 73 Fed. Rep., 409.

It was error, I think, for the commission to hold that the carriers could not justify themselves, because they had not first made application for relief under the proviso of the 4th section. It has been held that if the carrier can show that the circumstances and conditions of the two hauls are dissimilar, the statute has not been violated (*Int. Com. Com. v. A., T. & S. F. R. R. Co.*, 50 Fed. Rep., 295), and this seems a reasonable construction of the law.

The case, therefore, it appears to me, came into the circuit court without any finding of fact upon which an order against the carriers could be predicated. The circuit judge examined the testimony and considered the evidence tending to prove that the through rate had been forced down by the natural advantages of Charleston as a trade centre, having numerous routes by rail, by rail and water, and by water over which merchandise of the kind in question was brought to that city, and to compete with which the defendant carriers were obliged to reduce their railroad rates on through freight to Charleston. Summerville had no similar natural or artificial advantages, and its only carrier, the South Carolina and Georgia railroad, was not subject to having its local rates forced down by competition below what was reasonable and just.

143 Upon consideration of all the proven facts, the circuit judge found that the circumstances and conditions were not substantially similar, and that the defendant carriers had not violated the act.

With this conclusion I agree. There is abundant proof to support it and also to show the great loss which would result to the South Carolina & Georgia railroad (the successor of the South Carolina railroad), if it was required to conform its local rates to its share of the through rates.

144 Afterwards, at the same term, to wit, on November 6, 1897, the court here made and entered the following decree, to wit:

Decree.

United States Circuit Court of Appeals, Fourth Circuit.

HENRY W. BEHLMER, Appellant,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE Central Railroad and Banking Company of Georgia, and H. M. Comer, its Receiver, as Lessees of the Georgia Railroad; The Memphis and Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as Receivers of said Last Two Mentioned Roads, and The Southern Railway Company, the Purchaser, Assignee, and Successor of said East Tennessee, Virginia and Georgia Railway Company; The South Carolina Railway Company and its Receiver, Daniel H. Chamberlain, and The South Carolina and Georgia Railroad Company, the Purchaser, Assignee, and Successor of the Same, Appellees.

No. 173.

Appeal from the circuit court of the United States for the district of South Carolina.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of South Carolina and was argued by counsel.

On consideration whereof it is now here ordered, adjudged,
 145 and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs, and this cause is remanded to the said circuit court of the United States for the district of South Carolina, at Charleston, with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them under circumstances and conditions similar to those set out in the petition filed in this cause from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities respectively for the long distance from Memphis aforesaid to Charleston, in the State of South Carolina; that said court will also see that the requirements of said decree are immediately carried into effect and enforced, as provided for in said act to regulate commerce, and will
 146 further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fees to the appellant's counsel as that court may under the circumstances of this case think proper and just.

It is further ordered that the mandate of this court issue after the expiration of 20 days from the date hereof.

November 6, 1897.

NATHAN GOFF.

Afterwards, at the same term, to wit, on November 10, 1897, Ed. Baxter, Esquire, solicitor for the petitioners (appellees), presented to the court here a petition for a rehearing, which is as follows, to wit :

Petition for Rehearing and Exhibit, Opinion of Supreme Court.

Filed November 10, 1897.

147 [Stamped :] Clerk's office, U. S. circuit court of appeals, fourth circuit. H. T. Meloney, clerk, Richmond.

Petition for Rehearing.

United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,	} No. 173. Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston, S. C.
<i>vs.</i>	
THE LOUISVILLE & NASHVILLE Railroad Company <i>et al.</i> , Appellees.	}

To the honorable the judges of the United States circuit court of appeals for the fourth circuit :

Your petitioners, The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad ; The Memphis & Charleston Railroad Company ; The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads ; and The Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company ; The South Carolina Railway Company, and its receiver, Daniel H. Chamberlain ; and The South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, respectfully show to your honors that this cause came on to be heard in this honorable court on the transcript of the record from the circuit court of the United States for the district of South Carolina ; and on consideration whereof it was, on the sixth day of November, 1897, ordered, adjudged and decreed by this court as follows, viz :

" That the decree of the said circuit court in this cause be, and the same is hereby reversed, with costs, and this cause is remanded to the said circuit court of the United States for the district of South Carolina, at Charleston, with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried

148 by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina. That said court will also see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

"It is further ordered that the mandate of this court issue after the expiration of 20 days from the date hereof."

No mandate has yet been issued.

Your petitioners are advised and humbly submit that said order and decree of this court of November 6th, 1897, is erroneous, and the same ought to be reversed; and your petitioners respectfully state the following grounds, viz:

1. It is respectfully submitted that this court erred in reversing said decree of said circuit court in this cause.

2. It is respectfully submitted that this court erred in remanding this cause to said circuit court.

3. It is respectfully submitted that this court erred in instructing said circuit court to enter a decree herein, requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce; and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

149 4. It is respectfully submitted that this court erred in not affirming the decree of said circuit court which was reversed by this court.

5. It is respectfully submitted that this court erred because it failed to adjudge and decree that the matters of equity alleged in the bill filed in said circuit court, in this cause, are fully denied in the answer, and are not sustained by the proof, and that said bill be dismissed.

6. It is respectfully submitted that this court erred, because it, in effect, decided that the rates charged by petitioners for the trans-

portation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis in the State of Tennessee, to Summerville in the State of South Carolina, are unjust and unreasonable.

7. It is respectfully submitted that this court erred, because it, in effect, decided that the transportation of hay or other commodities carried by petitioners from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, is alike and contemporaneous service rendered under substantially similar circumstances and conditions, with the transportation of hay or other commodities carried by petitioners from Memphis, Tennessee, to Charleston, S. C.

8. It is respectfully submitted that this court erred, because it, in effect, decided that as petitioners make a greater charge in the aggregate on hay or other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., than they make on such freight carried by them from Memphis, Tennessee, to Charleston, S. C., they thereby give to Charleston, S. C., and its traffic an undue or unreasonable preference or advantage, and subject Summerville, S. C., and its traffic to an undue or unreasonable prejudice or disadvantage.

9. It is respectfully submitted that this court erred, because it, in effect, decided that the transportation by petitioners of hay or other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance, as compared with the transportation by petitioners of hay or other commodities, carried by them from Memphis, Tennessee, to Charleston, S. C.

150 10. It is respectfully submitted that this court erred because it in effect decided that the Interstate Commerce Commission has the power to fix the rates of transportation from Memphis, Tennessee, to Summerville, South Carolina, to be charged by petitioners as common carriers subject to the act to regulate commerce.

Petitioners submit herewith a duly certified copy of the opinion of the Supreme Court of the United States in the case of *The Interstate Commerce Commission, appellant, vs. The Alabama Midland Railway Company et al.*, appellees, No. 203, October term, 1897, of said court; which opinion was delivered by said court on November 8th, 1897, five days after the opinion in this case was delivered by this court.

Wherefore petitioners respectfully pray that this cause may be reheard before this court; that the issuance of the mandate in this case be suspended until this application can be heard; and that the said order and decree rendered by this court in this cause on November 6th, 1897, may be reversed and that said decree of the circuit court of the United States for the district of South Carolina, rendered in this cause, be affirmed, with costs, and that such other

orders and decrees may be made as to your honors may seem meet and the circumstances of the case may require. As in duty bound your petitioners will ever pray, etc.

ED. BAXTER,
Solicitor for Petitioners.

I, Ed. Baxter, an attorney and solicitor, practicing in United States circuit court of appeals, fourth circuit, do certify that in my opinion, the grounds stated in the above petition for a rehearing are well founded in law and fact, and that this cause is proper to be reheard before your honors, if your honors shall think fit.

ED. BAXTER,
Attorney and Solicitor.

151 Supreme Court of the United States, October Term, 1897.

THE INTERSTATE COMMERCE COMMISSION,	} No. 203. Appeal from the United States Cir- cuit Court of Appeals for the Fifth Circuit.
Appellant.	
vs.	
THE ALABAMA MIDLAND RAILWAY COM- pany <i>et al.</i>	

(November 8, 1897.)

On the 27th day of June, 1892, the Board of Trade of Troy, Alabama, filed a complaint before the Interstate Commerce Commission at Washington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections, claiming that in the rates charged for transportation of property by the railroad companies mentioned and their connecting lines there is a discrimination against the town of Troy, in violation of the terms and provisions of the interstate commerce act of Congress of 1887.

The general ground of complaint is, that Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and give the latter an undue preference or advantage in respect to certain commodities and classes of traffic. The specific charges insisted on at the hearing, and to which the testimony relates, are:

1. That the Alabama Midland railway and the defendant roads forming lines with it from Baltimore, New York and the East to Troy and Montgomery charge and collect a higher rate of shipments of class goods from those cities to Troy than on such shipments through Troy to Montgomery; the latter being the longer-distance point by fifty-two miles.

2. That the Alabama Midland railway and Georgia Central railroad and their connections unjustly discriminate against Troy and in favor of Montgomery in charging and collecting \$3.22 per ton to Troy on phosphate rock shipped from the South Carolina and Florida fields and only \$3.00 per ton on such shipments to Montgomery, the longer-distance point by both of said roads; and that all phosphate

rock carried from said fields to Montgomery over the road of the Alabama Midland has to be hauled through Troy.

3. That the rates on cotton, as established by said two roads and their connections, on shipments to the Atlantic seaports, Brunswick, Savannah and Charleston, unjustly discriminate against Troy and in favor of Montgomery, in that the rate per hundred pounds from Troy is forty-seven cents, and that from Montgomery, the longer-distance point, is only forty cents, and that such shipments from Montgomery over the road of the Alabama Midland have to pass through Troy.

4. That on shipments for export from Montgomery and other points, within the so-called "jurisdiction" of the Southern Railway and Steamship Association to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a lower rate is charged than the regular published tariff rate to such seaports, and that Montgomery and such other points are allowed by the rules of said association to ship through to Liverpool via any of these seaports at the lowest through rates on the day of shipment, which may be less than the sum of the regular published rail rate and the ocean rate via the port of shipment; that this reduction is taken from the published tariff rail rate to the port of shipment; that, this privilege being denied to Troy, is an unjust discrimination against that town in favor of Montgomery and such other favored cities, and that it is also a discrimination against shipments which terminate at such seaports in favor of shipments for export.

5. That Troy is unjustly discriminated against in being charged on shipments of cotton via Montgomery to New Orleans the full local rate to Montgomery by both the Alabama Midland and Georgia Central.

6. That the rates on "class" goods from western and northwestern points, established by the defendants forming lines from those points to Troy, are relatively unjust and discriminatory as against Troy when compared with the rates over such lines to Montgomery and Columbus.

The commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified, as follows, to wit:

1. On class goods shipped from Louisville, Kentucky; Saint Louis, Missouri, or Cincinnati, Ohio, to Troy aforesaid, no higher rate of charge than is now charged and collected on such shipments to Columbus, Georgia, and Eufaula, Alabama.

2. On shipments of cotton from Troy aforesaid through Montgomery, Alabama, to New Orleans, Louisiana, no higher rate of charge than fifty cents per hundred pounds.

3. On shipments of cotton from Troy aforesaid for export through the Atlantic seaports, to wit, Brunswick, Savannah, Charleston, West Point or Norfolk, no higher rate of charge to these ports than is

charged and collected on such shipments from Montgomery aforesaid.

4. On shipments of cotton from Troy aforesaid to the ports of Brunswick, Savannah or Charleston, no higher rate of charge than is charged and collected on such shipments from Montgomery aforesaid through Troy to said ports.

5. On shipments of class goods from New York, Baltimore or other northeastern points to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

6. On shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

The defendants having failed to heed these orders, the commission thereupon filed this bill of complaint in the circuit court of the United States for the middle district of Alabama, in equity, to compel obedience to the same. On the hearing in said court the bill of complaint was dismissed, and complainant, The Interstate Commerce Commission, appealed the cause to the United States circuit court of appeals for the fifth judicial circuit, at New Orleans, Louisiana. And, thereupon, in said last-named court, on the 2d day of June, 1896, the decree of the said circuit court of the United States for the middle district of Alabama was in all things duly affirmed; and from this judgment and decree the appellant has appealed to this court.

Mr. Justice SHIRAS delivered the opinion of the court:

Several of the assignments of error complain of the action of the circuit court of appeals in not rendering a decree for the enforcement of those portions of the order of the Interstate Commerce Commission which prescribed rates, to be thereafter charged by the defendant companies for services performed in the transportation of goods.

153 Discussion of those assignments is rendered unnecessary by the recent decisions of this court, wherein it has been held, after elaborate argument, that Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute; and that, as it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal, after having determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just. (*Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission*, 162 U. S., 184; *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway Company*, 167 U. S., 479.)

Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of

the commission, wherein it was found and decided, among other things, that the defendant common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis and Cincinnati, and from New York, Baltimore and other north-eastern points, and the defendant common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendant common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point or Norfolk, as local shipments or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus and other places and localities and dealers and shippers therein, in violation of the provisions of the act to regulate commerce.

Whether competition between lines of transportation to Montgomery, Eufaula and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission under the proviso to the fourth section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case:

It is contended, in the briefs filed on behalf of the Interstate Commission, that the existence of rival lines of transportation and, consequently, of competition for the traffic, are not facts to be considered by the commission, or by the courts, when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act.

Such, evidently, was not the construction put upon this provision of the statute by the commission itself in the present case, for the record discloses that the commission made some allowance for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery and Troy respectively, and that, among the errors assigned, is one complaining that the court erred in not holding that the rates prescribed by the commission in its order made due allowance for such dissimilarity.

So, too, in case *In re Louisville & Nashville R. R. Co.* (1 I. C. C. Rep., 77), in discussing the long and short haul clause, it was said by the commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the

longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view."

It is, no doubt, true that in a later case, *Railroad Commission of Georgia v. Clyde Steamship Co. et al.* (5 I. C. C. Rep., 327), the commission somewhat modified their holding in the Louisville and Nashville Railroad Company case, just cited, by attempting to restrict the competition, that it is allowable to consider, to the cases of competition with water carriers, competition with foreign railroads, competition with railroad lines wholly in a single State; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the circuit courts. It is sufficient to cite a few of the number: *Ex parte Kochler* (31 Fed. Rep., 319); *In re M. P. Ry. Co.* (31 Fed. Rep., 862); *I. C. C. v. A., T. & S. F. R. Co.* (50 Fed. Rep., 306); *I. C. C. v. New Orleans & Tex. Pac. R. Co.* (56 Fed. Rep., 943); *Behlmer v. Louisville & Nash. R. Co.* (71 Fed. Rep., 835); *I. C. C. v. Louis. & Nash. R. Co.* (73 Fed. Rep., 409).

In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. (*Denaby Colliery Company v. Manchester, S. & L. Rwy. Co.*, 11 App. Cas., 97; *Phipps v. London & North Western Railway*, 2 Q. B. D., 1892, p. 229.)

But the question whether competition as affecting rates is an element for the commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court.

In *Interstate Com. Commission v. B. & O. R. R. Co.* (145 U. S., 263) it was said, approving observations made by Jackson, circuit judge (43 Fed. Rep., 37), that the act to regulate commerce was "not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road; that it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; that it is not all discriminations or preferences that fall within the inhibitions of the statute, only such as are unjust or unreasonable;" and, accordingly, it was held that the issue by a railway company,

engaged in interstate commerce, of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust or unreasonable charge" against such individual within the meaning of the first section of the act to regulate commerce; nor make "an unjust discrimination" against him within the meaning of the second section; nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket within the meaning of the third section.

In *Texas and Pac. Railway v. Interstate Com. Com.* (162 U. S., 197) it was held that "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affect rates should be considered, and in deciding whether rates and charges, made at a low rate to secure freights which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

As we have shown in the recent case of *Wight v. United States* (167 U. S., 512), the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor, and we there held that the phrase "under substantially similar circumstances

and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates.

156 In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such, as having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

It is further contended, on behalf of the appellant, that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the act to regulate commerce, will justify a departure from the rule of the fourth section of the act without authority from the Interstate Commerce Commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this, that when circumstances and conditions are substantially dissimilar, the railway companies can only avail themselves of such a situation by an application to the commission.

The language of the proviso is as follows:

"That upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than shorter distances for the transportation of persons or property, and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The claim now made for the commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on the account of the existence of competition, or any other similar element which would make its application unfair, is the commission itself, which is bound to con-

sider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable.

The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue. The gravamen of the complaint is that the defendant companies have continued to charge and collect a greater compensation for services rendered in transportation of property than is prescribed in the order of the commission. It was not claimed that the defendants were precluded from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions by reason of not having applied to the commission to be relieved from the operation of the fourth section.

Moreover, this view of the scope of the proviso to the fourth section does not appear to have ever been acted upon or enforced by the commission. On the contrary, in the case of *In re Louisville & Nashville R. R. Company v. Interstate Com. Com.* (1 I. C. C. Rep., 57) the commission, through Judge Cooley, said, in speaking of the effect of the introduction into the fourth section of the words "under substantially similar circumstances and conditions," and of the meaning of the proviso: "That which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid, the carrier is left at liberty to do, without permission of any one. * * *

157 compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. * * * Beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier, whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions."

The view thus expressed has been adopted in several of the circuit courts; *I. C. C. v. A., T. & S. F. R. R. Co.* (50 Fed. Rep., 300); *I. C. C. v. Cin., New Or. & Tex. Pac. R'y Co.* (56 Fed. Rep., 942); *Behlmer v. Louis. & Nash. R. Co.* (71 Fed. Rep., 839); and we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissim-

ilar, from making different rates until and unless the commission shall authorize them so to do, much less do we think that it was the intention of Congress that the decision of the commission, if applied to, could not be reviewed by the courts. The provisions of section 16 of the act, which authorize the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section as to those arising under the other sections of the act.

Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the Interstate Commerce Commission's complaint.

As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity
 158 or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case. (*Denaby Main Colliery Company v. Manchester Railway Co.*, 3 Railway & Canal Traffic Cases, 426; *Phipps v. London & North Western Railway*, 1892, 2 Q. B. D., 229; *Cincinnati, N. O. & Tex. Pac. R. W. v. Interstate Com. Com.*, 162 U. S., 184, 194; *Texas and Pacific Railway v. Interstate Com. Com.*, 162 U. S., 197, 235.)

The circuit court, after a consideration of the evidence, expressed its conclusion thus:

"In any aspect of the case it seems impossible to consider this complaint of the board of trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central railroads, in the matter of the charges upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the fourth or any other section of the

interstate commerce act. The conditions are not substantially the same and the circumstances are dissimilar, so that the case is not within the statute. The case made here is not the case as it was made before the commission. New testimony has been taken, and the conclusion reached is that the bill is not sustained; that it should be dismissed, and it is so ordered" (69 Fed. Rep., 227).

The circuit court of appeals, in affirming the decree of the circuit court, used the following language:

"Only two railroads, the Alabama Midland and the Georgia Central, reach Troy. Each of these roads has connection with other lines, parties hereto, reaching all the long-distance markets mentioned in these proceedings. The commission finds that no departure from the long and short haul rule of the fourth section of the statute, as against Troy as the shorter-distance point and in favor of Montgomery as the longer-distance point, appears to be chargeable to the Georgia Central. The rates in question when separately considered are not unreasonable or unjust. As a matter of business necessity they are the same by each of the railroads that reach Troy. The commission concludes that as related to the rates to Montgomery, Columbus and Eufaula, the rates to and from Troy unjustly discriminate against Troy, and in the case of the Alabama Midland violate the long and short haul rule.

"The volume of population and of business at Montgomery is many times larger than it is at Troy. There are many more railway lines running to and through Montgomery connecting with all the distant markets. The Alabama river, open all the year, is capable, if need be, of bearing to Mobile, on the sea, the burden of all the goods of every class that pass to or from Montgomery. The competition of the railway lines is not stifled, but is fully recognized, intelligently and honestly controlled and regulated by the traffic association in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent or under the bias of any personal preference for Montgomery or prejudice against Troy that has led them, or is likely to lead them, to unjustly discriminate against Troy. When the rates to Montgomery were higher a few years ago than now, actual active water-line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates, and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in force as long as the river remains navigable to its present capacity. And this water line affects to a degree less or more all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from Montgomery to the South Atlantic ports for export, but it would take the cotton to the points of its ultimate destination if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from
159 Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actually

competing for it, a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the circuit court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by its board of trade. We do not discuss the third and fourth contention of the counsel for the appellant further than to say that, within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to traffic or persons similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business." (21 U. S. Ct. Ct. of App. Rep., 51.)

The last sentence in this extract is objected to by the commission's counsel, as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. If so read, we should not be ready to adopt or approve such a position. But we understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences. And such charges were made in the present case, and were considered, in the first place by the commission and afterwards by the circuit court and by the circuit court of appeals.

The first contention we encounter, upon this branch of the case, is that the circuit court had no jurisdiction to review the judgment of the commission upon this question of fact; that the court is only authorized to inquire whether or not the commission has miscon-

strued the statute and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact and not of power, and hence unreviewable.

We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter and in such manner as to do justice in the premises.

160 In the case of *Cincinnati, N. O. and Texas Pacific R. W. Co. v. I. C. Com.* (162 U. S., 184) the findings of the commission were overruled by the circuit court, after additional evidence taken in the court, and the decision of the circuit court was reviewed in the light of the evidence and reversed by the circuit court of appeals, and this court, in reference to the argument that the commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that as the question was one of fact, peculiarly within the province of the commission, and as its conclusions had been accepted and approved by the circuit court of appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the circuit court of appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence and in this court to review their decisions.

So in the case of *Texas and Pacific Railway Company v. Interstate Com. Com.* (162 U. S., 197) the decision of the circuit court of appeals, which affirmed the validity of the order of the commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that, in the case under consideration, the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the circuit court had no jurisdiction to consider the evidence and thereupon to affirm the validity of the order of the commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings or conclusions of the commission."

Accordingly our conclusion is that it was competent, in the present case, for the circuit court, in dealing with the issues raised by the petition of the commission and the answers thereto, and for the circuit court of appeals on the appeal, to determine the case upon a consideration of the allegations of the parties and of the evidence adduced in their support, giving effect, however, to the findings of fact in the report of the commission as *prima facie* evidence of the matters therein stated.

It has been uniformly held by the several circuit courts and the circuit courts of appeal, in such cases, that they are not restricted to the evidence adduced before the commission, nor to a consideration

merely of the power of the commission to make the particular order under question, but that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the commission itself recognized such a state of facts by making an allowance in the rates proscribed, for dissimilarity resulting from competition, and it was contended on behalf of the commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the extent shown, and that the allowance made therefor by the commission was a *due* allowance.

161 The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the circuit court of appeals is accordingly affirmed.

True copy.

Test:

[Seal of Court.]

JAMES H. MCKENNEY,
Clerk Supreme Court U. S.

162 Whereupon the court made and entered the following order, to wit:

Order Suspending Mandate.

Filed November 11, 1897.

U. S. Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,	} No. 173. Appeal from the Circuit Court of the United States for the District of South Carolina.
<i>vs.</i>	
THE LOUISVILLE & NASHVILLE RAIL- road Company <i>et al.</i> , Appellees.	

The appellees having this day tendered their petition for a rehearing of this cause, asking that the decree rendered by this court in the same, of November 6, 1897, be reversed, and that such other order or decree be entered herein as under the circumstances may

be proper; it is hereby ordered that said petition be filed, and that, pending its consideration by the court, the issuance of the mandate in this case be suspended.

Nov. 11, 1897.

NATHAN GOFF,
Senior Circuit Judge, Presiding.

163 Afterwards, at the same term, to wit, November 24, 1897, the court made and entered the following order, to wit:

Order Denying Rehearing and Withholding Mandate.

Filed November 24, 1897.

United States Circuit Court of Appeal, Fourth Circuit.

HENRY W. BEHLMER, Appellant,	} No. 173. Appeal from the
vs.	
LOUISVILLE AND NASHVILLE RAIL-	} Circuit Court of the United
road Company <i>et al.</i> , Appellees.	
	} States for the District of
	} South Carolina.

This cause having been decided at this term in favor of the appellant, and the appellees, by Ed. Baxter, attorney, having presented to the court, on the 10th day of November, 1897, a petition for a rehearing of the cause—

It is now here ordered and adjudged by this court that the rehearing asked for be, and the same is hereby, refused.

164 It is further ordered that the mandate of this court to the court below be withheld until the 20th day of January, 1898.

NATHAN GOFF.

November 24, 1897.

Afterwards, at the same term, to wit, on January 17, 1898, the said appellees, by their solicitor, prayed an appeal to the Supreme Court of the United States and filed therewith their assignment of errors and appeal bond, which are as follows, to wit:

Prayer of Appeal to the Supreme Court.

Filed January 17, 1898.

In United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,	} No. 173.
vs.	
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY	
<i>et al.</i> , Appellees.	

Petition for appeal.

164½ Said appellees, The Louisville & Nashville Railroad Company and The Central Railroad & Banking Company of Georgia and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The

HENRY W. BEHLMER.

East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of the two last-mentioned roads, and The South- Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company, and The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, conceiving themselves aggrieved by the decree entered in this cause in said United States circuit court of appeals on the sixth day of November, 1897, do hereby appeal from said decision to the Supreme Court of the United States, and they pray that their said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

January 17, 1898.

JOS. W. BARNWELL,
Solicitor for S. C. & Ga. R. R.
ED. BAXTER,

Solicitor for Appellees as of Record.

165

Assignment of Errors.

Filed January 17, 1898.

In the United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,
vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY } No. 173.
et al., Appellees.

On the 17th day of January, in the year of our Lord eighteen hundred and ninety-eight, came the said appellees, The Louisville and Nashville Railroad Company and The Central Railroad and Banking Company of Georgia and H. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of the last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East

Tennessee, Virginia and Georgia Railway Company, and The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad

Company, the purchaser, assignee, and successor of the same, by Ed. Baxter and Joseph W. Barnwell, their solicitors, and say that in the decree rendered by said circuit court of appeals in the above-entitled cause on the sixth day of November, 1897, and in the record and proceedings in said cause in said court there is manifest error, in this, to wit:

I.

That said circuit court of appeals erred in reversing and remanding the decree rendered in the above-entitled cause on January 22nd, 1896, by the circuit court of the United States for the district of South Carolina.

II.

That said circuit court of appeals erred in instructing said circuit court to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them under circumstances and conditions similar to those set out in the petition filed in this cause from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities respectively for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect and enforced, as provided for in said act to regulate commerce, and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may under the circumstances of this case think proper and just.

III.

That said circuit court of appeals erred in decreeing that said appellees should pay the costs of said cause in said circuit court of appeals.

IV.

That said circuit court of appeals erred in not affirming said decree rendered in said cause January 22nd, 1896, by said circuit court of the United States for the district of South Carolina.

V.

That said circuit court of appeals erred because it failed to adjudge and decree that the matters of equity alleged in the bill filed in the above-entitled cause are fully denied in the answers and are not sustained by the proof, and that said bill be dismissed.

VI.

That said circuit court of appeals erred because it in effect decided that the rates charged by the above-named appellees for the transportation of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., are unjust and unreasonable.

VII.

That said circuit court of appeals erred because it in effect decided that the transportation of hay and other commodities carried

by the above-named appellees from Memphis, Tennessee, to Summerville, S. C., is a like contemporaneous service, under substantially similar circumstances and conditions, with the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Charleston, S. C.

VIII.

That said circuit court of appeals erred because it in effect decided that as the above-named appellees make a greater charge in the aggregate on hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., than they make on such freight from Memphis, Tennessee, to Charleston, S. C., they thereby give to Charleston, S. C., and its traffic an undue or unreasonable preference or advantage, and subject Summerville, S. C., and its traffic to an undue or unreasonable prejudice or disadvantage.

IX.

That said circuit court of appeals erred because it in effect decided that the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Charleston, S. C.

X.

That said circuit court of appeals erred because it in effect decided that the Interstate Commerce Commission has the power to fix the rates of transportation to be charged by the above-mentioned appellees for carrying freight from Memphis, Tennessee, to Summerville, S. C.

XI.

That the said circuit court of appeals erred in directing that a counsel fee should be paid to the counsel of appellant in said court, and in not deciding that the act known as the interstate commerce act, in so far as it directs the payment of a counsel fee to the successful party complaining against railroad corporations engaged as carriers of interstate commerce, while it provides for no similar counsel fee to such railroad companies in case judgment be in their favor, is unconstitutional and void, inasmuch as it deprives such railroad companies of their property without due process of law.

XII.

That said circuit court of appeals erred in not sustaining the decree of the circuit court dismissing the petition of appellant as against The South Carolina & Georgia Railroad Company, appellee,

on the ground that the said company was not served with the order of the commission requiring said company to desist from charging any greater compensation in the aggregate for transportation of hay or other commodities from Memphis to Summerville than that contemporaneously charged and received from Memphis to Charleston.

XIII.

That said circuit court of appeals erred in deciding that there was any proof whatever of the service of a copy of the order of the Interstate Commerce Commission made in said cause upon the appellee, The South Carolina & Georgia Railroad Company, and in not deciding that it was beyond the power of the circuit court, after dismissing the petition of appellant, to alter, correct, or amend
 172 said decree after the term had expired in which the decree dismissing said petition was filed.

XIV.

That said circuit court of appeals erred in reversing the decree of the circuit court, which found that the appellee The South Carolina & Georgia Railroad Company was not bound by the proceedings before the Interstate Commerce Commission brought against D. H. Chamberlain, receiver of the South Carolina Railway Company, unless proof was made of the service upon said appellant of a copy of the order of said Interstate Commerce Commission, and in deciding that the purchase at a foreclosure sale of the property of the South Carolina Railway Company by a committee of its mortgage bondholders and the conveyance of said property to a new corporation, the South Carolina & Georgia Railroad Company, was a mere change of name.

Wherefore the above-named appellees, The Louisville and Nashville Railroad Company, The Central Railroad and Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company,
 173 company, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, pray that the said decree of said United States circuit court of appeals for the fourth circuit, rendered November 6th, 1897, be reversed, and that said court be ordered to enter a decree affirming the said decree rendered on the said 22nd day of January, 1896, in the above-entitled cause by the said circuit court of the United States for the district of South Carolina.

ED. BAXTER,

Solicitor for said Appellees as of Record.

JOS. W. BARNWELL,

Solicitor for the South Carolina & Georgia Railroad Company.

174

Appeal Bond.

Filed January 17, 1898.

In United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,	} No. 173.
<i>vs.</i>	
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY <i>et al.</i> , Appellees.	

Know all men by these presents that we, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and the Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, as principals, and Ed. Baxter, as surety, are held and firmly bound unto the above-named Henry W. Behlmer in the sum of two thousand dollars, to be paid to the said Henry W. Behlmer; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of January, in the year of our Lord eighteen hundred and ninety-eight.

Whereas the above-named The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the United States circuit court of appeals for the fourth circuit on the sixth day of November, 1897:

Now, therefore, the condition of this obligation is such that if the above-named Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia &

Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and the Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor
 177 of the same, shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, [SEAL.]

By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*

THE CENTRAL RAILROAD & BANKING COMPANY COMPANY OF GEORGIA. [SEAL.]

By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*

H. M. COMER, *Receiver,* [SEAL.]

By ED. BAXTER, *His Solicitor and Attorney-in-fact.*

THE MEMPHIS & CHARLESTON RAILROAD COMPANY, [SEAL.]

By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, [SEAL.]

By ED. BAXTER, *Its Solicitor and Attorney-in fact.*

SAMUEL SPENCER, *Receiver,* [SEAL.]

By ED. BAXTER, *His Solicitor and Attorney-in-fact.*

HENRY FINK, *Receiver,* [SEAL.]

By ED. BAXTER, *His Solicitor and Attorney-in-fact.*

178 CHAS. M. MCGHEE, *Receiver,* [SEAL.]

By ED. BAXTER, *His Solicitor and Attorney-in-fact.*

THE SOUTHERN RAILWAY COMPANY, [SEAL.]

By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*

THE SOUTH CAROLINA RAILWAY COMPANY, [SEAL.]

By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*

DANIEL H. CHAMBERLAIN, *Receiver,* [SEAL.]

By ED. BAXTER, *His Solicitor and Attorney-in-fact.*

THE SOUTH CAROLINA & GEORGIA RAILROAD COMPANY, [SEAL.]

By JOS. W. BARNWELL,

Its Solicitor and Attorney-in-fact.
 ED. BAXTER, *Surety.* [SEAL.]

Sealed and delivered and taken and acknowledged before me and approved by me this 17th day of January, eighteen hundred and ninety-eight.

NATHAN GOFF, *Judge.*

Thereupon, on the same day, the court here made and entered the following order, to wit:

Order Granting Appeal.

Filed January 17, 1898.

179 In the United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY
et al., Appellees.

No. 173.

Said appellees, The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of the said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, pray an appeal from the decree rendered by this court in the above-entitled cause on November sixth, 1897, to the Supreme Court of the

180 United States; and said appellees having filed with the clerk of this court their petition for appeal, together with an assignment of errors and an appeal bond, which bond has been duly approved, it is ordered, adjudged, and decreed by the court that said appeal be granted and allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

January 17, 1898.

NATHAN GOFF.

181

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To Henry W. Behlmer, Greeting:

You are hereby cited and admonished to be and appear at the court-room of the Supreme Court of the United States, at Washington, on the 14th day of March, eighteen hundred and ninety-eight, pursuant to an appeal allowed and granted by the United States circuit court of appeals for the fourth circuit in the case of Henry W. Behlmer, appellant, vs. The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia &

Georgia Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, as appellees, to show cause, if any there be, why the decree of said court of appeals rendered November 6th, 1897, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January, in the year of our Lord eighteen hundred and ninety-eight.

NATHAN GOFF, *Judge*.

This citation may be served by the marshal of the district where the said Henry W. Behlmer or his solicitor of record in the above cause may be found.

NATHAN GOFF, *Judge*.

182 Service of a copy of the above citation is hereby acknowledged this 20th day of January, 1898.

CLAUDIAN B. NORTHROP,

Solicitor for said Henry W. Behlmer.

[Endorsed:] 173. Acceptance of service of citation.

183

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To Henry W. Behlmer, Greeting:

You are hereby cited and admonished to be and appear at the court-room of the Supreme Court of the United States, at Washington, on the 14th day of March, eighteen hundred and ninety-eight, pursuant to an appeal allowed and granted by the United States circuit court of appeals for the fourth circuit in the case of Henry W. Behlmer, appellant, vs. The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, as appellees, to show cause, if any there be, why the decree of said court of appeals rendered November 6th, 1897, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January, in the year of our Lord eighteen hundred and ninety-eight.

NATHAN GOFF, *Judge*.

This citation may be served by the marshal of the district where the said Henry W. Behlmer or his solicitor of record in the above cause may be found.

NATHAN GOFF, *Judge.*

184 Service of a copy of the above citation is hereby acknowledged this — day of —, 1898.

Solicitor for said Henry W. Behlmer.

[Endorsed:] Entered in civil docket, fol. 39, this Jan'y 20, 1898. J. P. Hunter, U. S. marshal. Marshal's docket No. 154.

Personally comes James S. Simons, ch'f office deputy marshal, who, being duly sworn, deposes and says that he served a copy of the within citation on Henry W. Behlmer (personally), at Summer-ville, So. Ca., on 20 January, 1898.

J. S. SIMONS,
Ch'f Office Dept. Marshal.

Sworn to before me Jan'y 25, 1898.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S.

185 And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Test:

HENRY T. MELONEY, *Clerk.*

UNITED STATES OF AMERICA, ss:

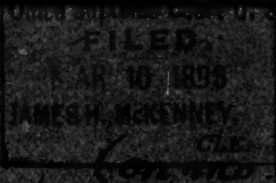
I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein-entitled cause, as the same remains upon the records and files of the said circuit court of appeals.

Seal United States Circuit Court of Appeals,
Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals for the fourth circuit, at Richmond, on this 31st day of January, A. D. 1898.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Ct.

Endorsed on cover: Case No. 16,798. U. S. C. C. of appeals, 4th circuit. Term No., 244. The Louisville and Nashville Railroad Company *et al.*, appellants, vs. Henry W. Behlmer. Filed February 17th, 1898.



Brief of Barker for Appels

Filed Mar. 10, 1898.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. *585*

The Louisville & Nashville R. R. Co. et al., Appellants,

vs.

Henry W. Behlmer,

Appellee.

MOTION TO VACATE SUPERSEDEAS.

Brief of Appellants Against Motion.

ED. BAXTER, Solicitor.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No.

The Louisville & Nashville R. R. Co. et al., Appellants,

v.s.

Henry W. Behlmer, Appellee.

MOTION TO VACATE SUPERSEDEAS.

Brief of Appellants Against Motion.

ED. BAXTER, Solicitor.

I.

STATEMENT OF FACTS.

A petition was filed before the Interstate Commerce Commission by the appellee, H. W. Behlmer; and such proceedings thereunder were had that on the 27th day of June, 1894, the Interstate Commerce Commission entered an order requiring the appellants to cease and desist on or before the 15th day of July, 1894, and thenceforth to abstain from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those appearing in this case, from Memphis, in the State of Tennessee, to Summer-ville, in the State of South Carolina, than that contemporaneous-

ly charged and received for the transportation of hay and such other commodities for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina.

The defendants to said proceeding before the Interstate Commerce Commission having failed to comply with such order, the said Henry W. Behlmer filed his petition, as he was authorized to do by the Interstate Commerce Law, in the Circuit Court of the United States for the District of South Carolina, in which the action before the Commission was set out, and the failure of the defendants therein to comply with said order; and prayer was made that an order be entered granting to the petitioner a writ of injunction, restraining the defendants, their officers, servants, and attorneys from continuing in their violation and disobedience to said order of the Interstate Commerce Commission, etc.

The case in said Circuit Court of the United States for the District of South Carolina was duly matured, and came on to be finally heard on the 11th day of December, 1895, when, after argument, the said Circuit Court of the United States took the same under advisement, and afterwards, on the 22d day of January, 1896, entered a decree dismissing the bill. From this decree the petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit of the United States. On appeal to said Circuit Court of Appeals for the Fourth Circuit, the decree of the Court below was reversed, and a decree of said Circuit Court of Appeals entered Nov. 6, 1897, directing that the order of the Interstate Commerce Commission be enforced. A petition for rehearing was filed, which was refused by the said Circuit Court of Appeals; but an order was entered withholding the mandate of the lower Court until the 20th day of January, 1898. On the 17th day of January, 1898, an appeal to the Supreme Court of the United States was allowed, said Louisville and Nashville Railroad Company and other defendants to the original proceeding, appellants in this Court, but appellees in the Circuit Court of Appeals, having filed with the Clerk of that Court their petition for

appeal, together with an assignment of errors and an appeal bond, which appeal bond was duly approved. In the order of the Circuit Court of Appeals granting said appeal, the following appears:

“ It is ordered, adjudged, and decreed by the Court that said appeal be granted and allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.”

The condition of the obligation of the appeal bond concludes that they “ shall prosecute said appeal to effect, and answer all damages and costs. If they fail to make said appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.”

The appeal bond, the order, and assignments of error were filed Jan. 17, 1898.

The citation on appeal was issued the said 17th day of January, 1898; and the service of the same was acknowledged by the solicitor for Henry W. Behlmer, appellee and movant, on the 20th day of January, 1898.

Said appellee, Behlmer, now moves this Court “ to vacate the supersedeas in the above cause, or for an order declaring that the appeal bond filed by the appellants in said cause does not operate as a supersedeas on the ground that Section 16 of the Act to regulate commerce forbids the security required on appeal to the Supreme Court to operate as a supersedeas in cases arising under that Act.”

II.

SUPERSEDEAS.

“In England, until the year 1772, an appeal from a decree or order in chancery suspended all proceedings; but since that time a contrary rule has prevailed there. The subject was reviewed by the House of Lords in 1807, and an order was made establishing the right of the Chancellor to determine whether and how far an appeal should be suspensive of proceedings, subject to the order of the House on the same subject. See Palmer’s Pract. H. L., 9, 10; 15 Vesey, 184; 3 Paige, 383, 385.”

Hovey vs. McDonald, 109 U. S., 150, 160.

“A supersedeas, properly so-called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence. If, before those acts are performed, an execution has been lawfully issued, a writ of supersedeas directed to the officer holding it will be necessary; but if the writ of execution has been not only lawfully issued, but actually executed, there is no remedy until the appellate proceedings are ended, when, if the judgment or decree be reversed, a writ of restitution will be awarded. To remedy the inconveniences that arose from an immediate issue of execution before the appellant proceedings could be perfected, the original Judiciary Act of 1789 provided, and the present Revised Statutes now provide, that no execution shall issue upon judgments in the courts of the United States, where a writ of error may be a supersedeas, until the expiration of ten days after the judgment. U. S. R. S., 1007. This regulation applies to proceedings in equity as well as to cases at law.”

Hovey vs. McDonald, 109 U. S., p. 150, 159.

The United States Revised Statutes, Sections 1000 and 1007, provide when an appeal or writ of error shall operate as a supersedeas.

Section 1000 is as follows:

“ Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid.”

Section 1007 is as follows:

“ In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterwards, with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, execution shall not issue until the expiration of (the said term of sixty) (ten) days.”

“ A supersedeas upon the appeal of a suit in equity operates to stay the execution of the decree appealed from.”

“ A supersedeas is not obtained by virtue of any process issued by this Court, but it follows as a matter of law from a compliance by the appellant with the provisions of the Act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given

him; but if the Court below is proceeding, through mistake or otherwise, to execute its judgment or decree, notwithstanding the supersedeas, we may, under Section 716, R. S., issue an appropriate writ to restrain that action; for it would be ' a writ necessary for the exercise of our jurisdiction.' ”

Goddard vs. Ordway, 94 U. S., 672, 673.

The cases are uniform as to this.

The slaughterhouse cases, 10 Wall., 289, 291.

Kitchen vs. Randolph, 93 U. S., 88.

It is not contended that the appellants have not complied with the provisions of the statute under which they are, under ordinary circumstances, entitled to a supersedeas, nor that a supersedeas is not as effective as though a writ had, in fact, issued.

A supersedeas is not, strictly speaking, a *statutory* remedy. It operates as of right upon the execution of the appeal bond approved by the lower Court, the filing of the assignments of error, the order of the lower Court granting the appeal, and the service of the citation on appeal upon the appellee, all of which has been done in this case.

The provisions under the Judiciary Act of the United States, as set out in the Revised Statutes hereinabove quoted, are *statutory regulations* of a right which existed under the laws and orders of the Chancery Court in England upon the adoption of the Constitution and the formation of the Government of the United States of America.

III.

SECTION 16 OF THE ACT TO REGULATE COMMERCE.

The provisions of Section 16 of the Act establishing the Interstate Commerce Commission, germane to the motion under consideration, are as follows:

"When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said Court may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal shall not operate to stay or supersede the order of the Court or the execution of any writ or process thereon."

But said Section 16 provides that such appeal shall not operate as a stay or supersedeas of the order of the Circuit Court only under certain circumstances. Those circumstances are:

1.—That the common carrier shall violate or refuse or neglect to obey or perform any lawful order or requirement of the Commission.

2.—That a petition shall have been filed in the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be.

3.—That, on hearing, such Circuit Court of the United States shall determine that the common carrier has disobeyed the lawful order or requirement of the Commission, and issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission and enjoining obedience to the same.

4.—That the appeal shall be from a Circuit Court of the United States to the Supreme Court.

The Circuit Court of the United States for the District of South Carolina entered a decree dismissing the petition of the appellee, Behlmer, and decreed that the order of the Interstate Commerce Commission was unlawful. Consequently the said Behlmer has not brought his motion within the terms of Section 16 of said Act to regulate commerce.

This is an appeal from a Circuit Court of Appeals to the Supreme Court; consequently the said Behlmer has not brought his motion within the terms of Section 16 of said Act to regulate commerce.

The provision of said Section 16, holding that an appeal should not operate as a supersedeas under certain circumstances, is in derogation of the laws and practice of the Chancery Court of England at the time of the adoption of the Constitution and the formation of the Government of the United States of America and of the laws of the United States. Consequently it should be strictly construed.

IV.

THE ACT OF 1891 ESTABLISHING THE CIRCUIT COURT OF APPEALS.

A.

The appellee and movant, H. W. Behlmer, insists that the Act of 1891 establishing Circuit Courts of Appeals expressly adopts and provides that the provision in Section 16 of the Act to regulate commerce, forbidding an appeal from a Circuit Court of the United States to the Supreme Court of the United States from acting as a supersedeas of the decree of a Circuit Court of the United States, shall apply to an appeal from a Circuit Court

of Appeals to the Supreme Court of the United States. He bases this contention upon Section 11 of the Act of 1891 establishing Circuit Court of Appeals.

On the contrary, Section 11 has reference only to the consideration of appeals or writs of error, by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals, and provides that the provisions of the law now in force regulating the methods and systems of review through appeals or writs of error to the Supreme Court of the United States shall regulate the method and system of appeals to and writs of error from the Circuit Court of Appeals.

It is necessary to set out Section 11 of the Act establishing Circuit Courts of Appeals:

“That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Courts of Appeals under the provisions of this Act shall be taken or sued out, except within six months after the entry of the order, judgment, or decree sought to be reviewed; provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the method and system of appeals and writs of error provided for in this Act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any Judge of the Circuit Courts of Appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.”

The object of the section is to declare as the law that no appeal or writ of error can be reviewed in the Circuit Court of Appeals, unless the same has been taken or sued out within six months after the entry of the order, judgment, or decree sought to be reviewed.

The proviso says that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals.

The proviso further declares that the law then in force regulating the methods and system of review through appeals or writs of error to the Supreme Court of the United States shall regulate the methods and system of appeals to, and writs of error from, the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error.

The proviso further gives to the judges of the Circuit Courts of Appeals the same discretion, power, and duty in regard to appeals to, and writs of error from, the Circuit Courts of Appeals, and the conditions of their allowance, that had theretofore been given to the justices or judges of the then existing courts of the United States.

Appellants therefore maintain that so far from the contention that the Act of 1891 prevents an appeal from the Circuit Court of Appeals to the Supreme Court of the United States from operating as a supersedeas of the decree of the Circuit Court of Appeals, it could only operate and prevent an appeal from a Circuit Court of the United States to a Circuit Court of Appeals from operating as a supersedeas in such cases as an appeal from a Circuit Court of the United States to the Supreme Court of the United States before the passage of the Act of 1891, would not operate as a supersedeas.

Before the passage of the Act of 1891 establishing the Circuit Courts of Appeals an appeal to the Supreme Court of the United States from a Circuit Court would have operated as a supersedeas, except where the Circuit Court of the United States had affirmed the decision of the Interstate Commerce Commission. In this case the Circuit Court of the United States dismissed the petition of the movant and appellee, H. W. Behlmer, who sought to enforce an order of the Interstate Commerce Commission. If such an appeal had been made directly to the Supreme Court of the United States, there would have been no necessity for a supersedeas, because the petitioner would have been the appellant. The movant and appellee appealed to the Circuit Court of Appeals from the decree of the Circuit Court refusing to enforce the order of the Interstate Commerce Commission. The Circuit Court of Appeals, of course, was not called upon to supersede the decree of the Circuit Court, there being no necessity for the same. The Circuit Court of Appeals acted in such case as the Supreme Court of the United States would have acted before the passage of the Act of 1891 establishing the Circuit Courts of Appeals.

There is no provision in the Act of 1891 establishing the Circuit Courts of Appeals that in case of an appeal from the Circuit Courts of Appeals to the Supreme Court of the United States, such appeal should not act as a supersedeas.

B.

The Act of 1891 establishing the Circuit Courts of Appeals repeals the provision in Section 16 of the Act to regulate commerce, providing that an appeal from a Circuit Court of the United States to the Supreme Court of the United States shall not operate as a supersedeas where the decree of a Circuit Court of the United States directs that an order of the Interstate Commerce Commission shall be complied with.

Section 5 of the Act creating the Circuit Courts of Appeals provides:

“That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases.”

“In cases of conviction of a capital or otherwise infamous crime.”

Yet in 163 U. S., p. 132, *U. S. vs. Rider*, it was held that the Judiciary Act of March 3, 1891 (the Act establishing Circuit Courts of Appeals), Chapter 517, 26 Statutes, 825, providing in Section 4 that “the review by appeal, by writ of error, or otherwise from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established, according to the provisions of this Act, regulating the same,” **REPEALED SECTIONS 651 and 697 of the Revised Statutes of the United States.**

Section 651 provides that whenever any question occurs on the trial or hearing of any criminal proceeding before a Circuit Court upon which the judges are divided in opinion, the point of division shall be certified under seal of the Court to the Supreme Court of the United States at their next session, and that imprisonment should not be allowed nor punishment inflicted in any case where the judges of such Court are divided in opinion upon the question touching the imprisonment or punishment.

Section 697 provides that where any question occurs on the hearing or trial of a criminal proceeding before a Circuit Court upon which the judges are divided in opinion, and the point upon which they disagree is certified to the Supreme Court according to law, said point shall be finally decided by the Supreme Court; and its decision and order in the premises shall be remitted to such Circuit Court, and there be entered of record, and shall have effect according to the nature of said judgment and order.

Notwithstanding the reservation of appeal was had to the Supreme Court of the United States in Section 5 of the Act establishing the Circuit Courts of Appeals, the Court held said Act did REPEAL Sections 651 and 697 of the Revised Statutes of the United States.

It was held in *I. C. C. vs. A. T. & S. F. Railroad*, 149 U. S., 264, that no appeal laid to the Supreme Court of the United States from decisions of the Circuit Courts upon the order of the Interstate Commerce Commission.

In *United States vs. Rider*, *supra*, the Court uses the following language:

“ It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose, and its terms, the Act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate.”

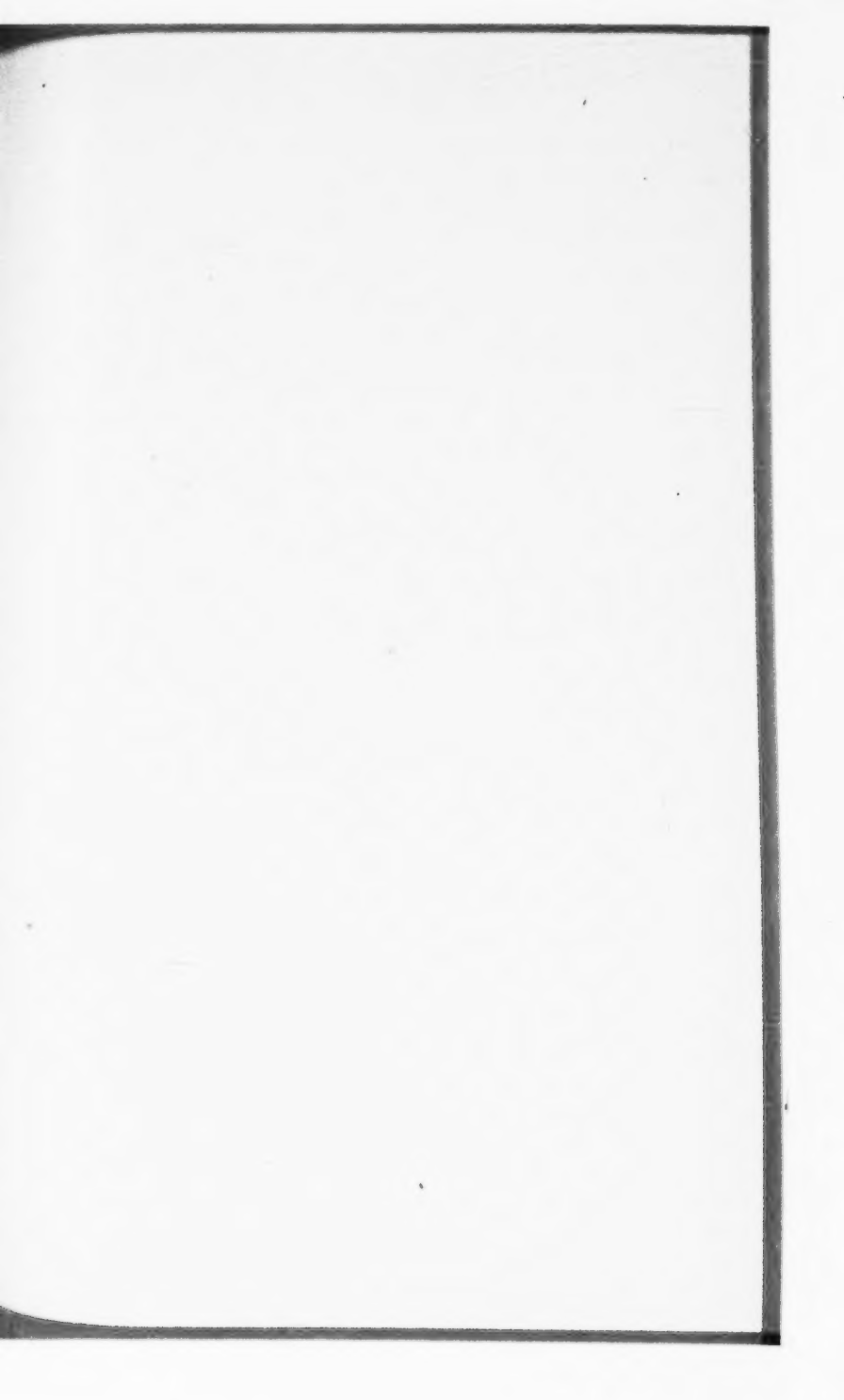
Wherefore it is respectfully submitted that the provision in Section 16 of the Act to Regulate Commerce, providing that appeals from a decree of a Circuit Court directing enforcement of a decree of the Interstate Commerce Commission shall not operate as a supersedeas, is repealed by the Act of 1891, establishing the Circuit Courts of Appeals; but, if such provision in Section 16 of the Act to Regulate Commerce has not been repealed by the Act of 1891 establishing the Circuit Courts of Appeals, that said provision in Section 16 of the Act to Regulate Commerce has no application to the motion under consideration:

First, because the Circuit Court refused to order the enforcement of the order of the Interstate Commerce Commission, and directed the dismissal of the petition of the complainant.

Second, because this is not an appeal from a Circuit Court of the United States to the Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Filed Nov 14, 1898.

THE LOUISVILLE & NASHVILLE R. R. CO. ET AL.

APPELLANTS,

VS.

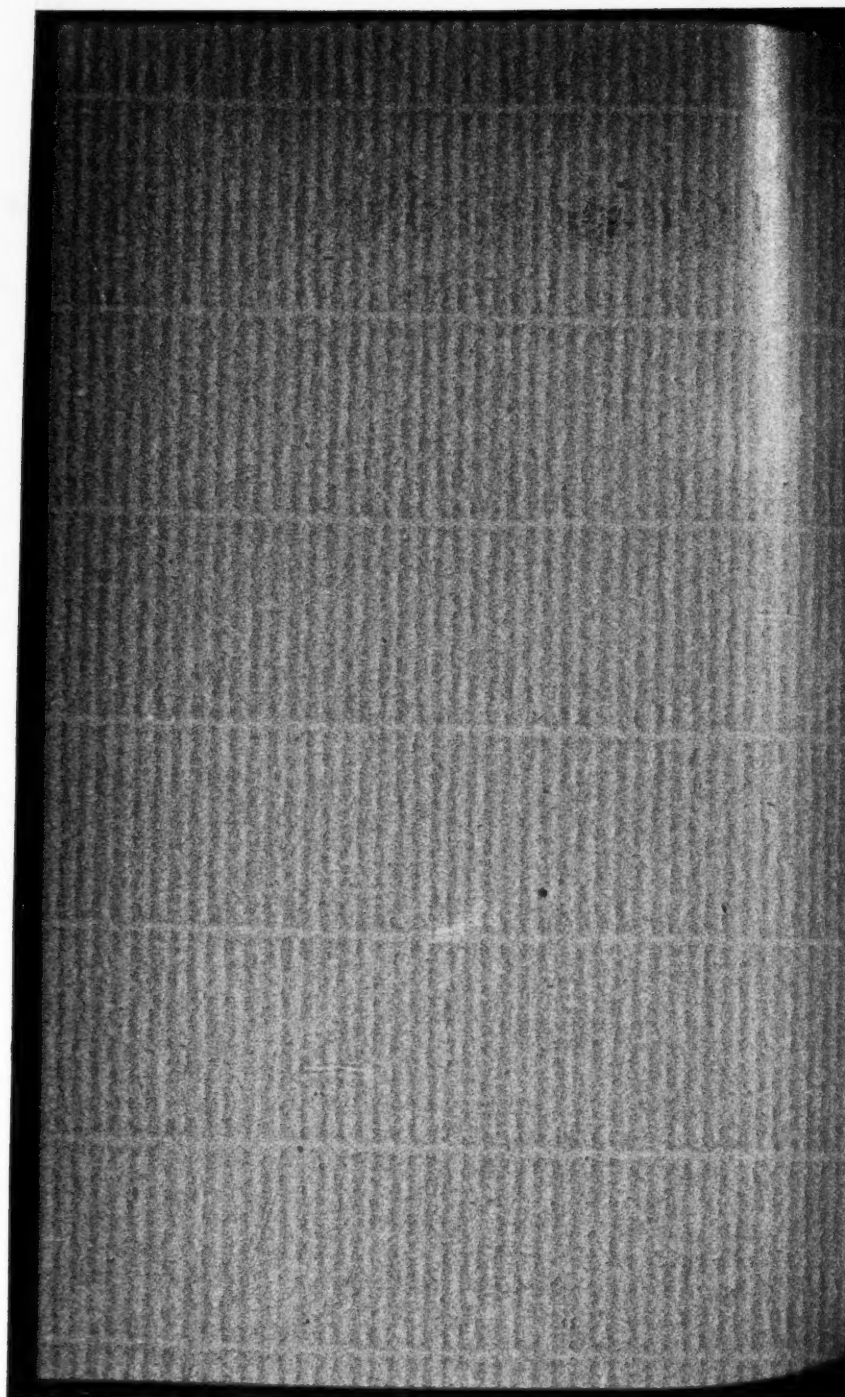
HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
FOURTH CIRCUIT.

MOTION TO VACATE SUPERSEDEAS.

BRIEF OF APPELLANT IN OPPOSITION.

JOSEPH W. BARNWELL,
Solicitor for South Carolina and
Georgia Railroad Company, Appellant.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

THE LOUISVILLE & NASHVILLE R. R. CO. ET AL.,

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STATEMENT.

On December 29th, 1892, the appellee, H. W. Behlmer, presented his petition to the Inter-State Commerce Commission complaining that the appellants, certain railroad companies doing a through business between Memphis, Tennessee, and Charleston, South Carolina, were, in violation of the fourth section of the Inter-State Commerce Act, (24. Stat. at Large, 379,) then transporting hay from Memphis to Charleston for a less rate than was charged from Memphis to Summerville, a town on the

same line of railroad, twenty-two miles nearer to Memphis than Charleston is.

The defence of the railroad companies was that Summerville is a small inland town with no competition whatever by water route, and only one railroad connection, while Charleston is possessed of eight all-rail routes and besides enjoys open water connection with North Atlantic ports, from which ports hay is directly imported to Charleston, and through which ports in connection with lake transportation hay is brought to Charleston from Chicago.

The Commission, following a series of decisions made by them, decided that they could not consider competition as affecting "the short and long haul" prohibition of Section 4 unless the competition was from precisely the same point of shipment to the point of longer destination, and that the "competition of other markets," which was the real defence of the railroads, could not be considered except under a special application to the Commission under the proviso of the fourth section, and the Commission thereupon directed the railroads to desist from charging more for the longer distance to Charleston than for the shorter distance to Summerville.

The railroads declining to obey the orders of the Commission, appellee, on the 2nd of November, 1894, filed his petition under the provisions of Section 16 of the Inter-State Commerce Act as amended by the Act of March 2nd, 1889, (25 Stat. at Large, 855,) in the Circuit Court of the United States for the District of South Carolina to enforce obedience to the orders of the Commission. A temporary injunction was issued by Judge Simonton, but dissolved on motion of the appellants on November 21st, 1894.

Upon the hearing on the merits, Judge Simonton differed from the Commission, and held that the competition of other markets could be considered, and did justify, under the facts proved, the railroads in charging less to Charleston where there was competition than to Summerville where there was none, and he dismissed appellee's petition by decree, filed Jan. 22nd, 1896. On April 7th, 1896, appellee

perfected an appeal to the Circuit Court of Appeals for the Fourth Circuit, and that Court, with strong dissent, reversed the Circuit Judge, the majority taking the view that the competition of other markets could not be considered except under special application to the Commission, and remanded on Nov. 3rd, 1897, the case to the Circuit Court, with direction to issue its orders to the railroads accordingly, and directing the payment of costs and counsel fees to appellee by the Railroad Companies.

Appellants then brought the case to this Court, obtaining an order from Judge Goff, one of the Justices who heard the case in the Court of Appeals, allowing the appeal, and giving the *supersedeas* bond required by him and serving the usual citation. The record has not yet been printed, but appellee has printed the opinion of the Circuit Court of Appeals together with his notice of motion, and Judge Simonton's opinion is for the convenience of the Court printed with this brief. (Appendix "A.")

The appellee now moves here to vacate the *supersedeas*, and failing an order to vacate, then that the Court declare that the filing of the appeal bond does not operate as a *supersedeas*.

ARGUMENT.

I.

PRELIMINARY.

In all the cases reported up to this time in which this Court has vacated a *supersedeas*, the objection has gone upon the ground of some delay or irregularity in the proceedings by which a *supersedeas* was obtained, and no case, it is submitted, can be found in which this Court has undertaken to decide on a motion to vacate, that in spite of the compliance with the Acts of Congress allowing a *supersedeas* on an appeal, yet no *supersedeas* was worked by reason of such compliance.

In the case of *ex-parte* French, (100 U. S., p. 1,) this Court decided that "if the writ is *informal* the remedy is by motion to vacate the writ and not by *mandamus* to have the judgment carried into execution." It would seem, therefore, that if the grant-

ing of the appeal by the Circuit Court of Appeals and the filing of the bond and the issuing of the citation in this case did not operate as a *supersedeas*, the remedy of appellee, should be by moving in the Courts below, inasmuch as no order granted by them and no act performed by them need be set aside. In the case of *In Re. Haberman Mfg. Co.*, (147 U S., p. 525,) a petition for *mandamus* was applied for in this Court, to compel the Circuit Court to grant a *supersedeas* on an appeal to the Circuit Court of Appeals from an injunction in a patent case, granted by the Circuit Court.

This Court refused the *mandamus* on the ground that under the seventh Section of the Judiciary Act of 1891, (26 Stat., 826,) discretion was allowed the Circuit Court to grant or refuse a *supersedeas* and this Court, therefore, could not control such discretion by *mandamus*. In that case the Court decided as to whether a *supersedeas* was operated by reason of the appeal, but the decision was not upon a motion to vacate, but upon petition for *mandamus*.

The motion here is merely that this Court construe the statute regulating appeals from the Circuit Courts in cases brought under the Inter-State Commerce Act, and not for a decision upon the informality of the appeal, which would be a mere question of the regularity of procedure and could be decided on motion from a simple inspection of the record.

II.

THE INTER-STATE COMMERCE LAW.

But conceding that the motion to vacate is the proper method of obtaining a construction of the Sixteenth Section of the Inter-State Commerce Act on the subject of the effect of an appeal (25 Stat. at Large 855,) it is submitted that the motion of appellee must be denied on a mere inspection of the terms of the Statute.

It is proper to say that this argument will proceed upon the theory that the provisions of the Inter-State Commerce Act forbidding a *supersedeas* in certain cases are not repealed by the Judiciary Act of 1891. It is not intended to concede that there

is no such repeal, but that ground has been specially and most effectively covered by counsel for the other appellants in opposition to this motion (Brief of Mr. Baxter, page 11) and it is not necessary to go over the argument here.

The clause of the Statute applying to appeals is as follows:

“When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said Court may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect of security for such appeal, but such appeal shall not operate to stay or supersede the order of the Court or the execution of any writ or process thereon. And such Court may in every such matter order the payment of such costs and counsel fees as shall be deemed reasonable.”

The whole of Section 16 of the Act will be found printed as an appendix to this brief. (Appendix “B.”)

III.

APPELLEE'S CONTENTION.

The contention of appellee is, that the words of the Statute forbidding an appeal to operate to stay or supersede an order or the execution of a writ or process of the trial Court apply also to the order, writs or process of the intermediate Court of Appeals.

IV.

THE OBJECT OF THE STATUTE.

1.

It is evident that the words of the Statute refer to the orders of the trial Court alone. At the time of the passage of the Statute, February 4th, 1887, and of the amendment of March 2nd, 1889, there were but two Courts to which the words of the Statute could in any way refer—the Circuit Court, which was the Court of first instance or trial Court and the Supreme Court, the Appellate Court; and accordingly the Statute speaks of only the orders of “said Court,” that is, the Court in which the proceedings were begun and from which orders, writs and process would

proceed—and “the Supreme Court,” the only Court of Appeals then in existence.

2.

It is well known that at the time of the passage of this Act and the amendments thereto, the dockets of this Court were so crowded as to render it almost impossible for a litigant to be heard in an ordinary appeal to this Court, except after the lapse of years. (*McLish vs. Roff*, 141 U. S. page 661.) In the meantime the abuses by carriers engaged in Inter-State Commerce, although rebuked by the trial Court would proceed in spite of the agreement both of the Inter-State Commerce Commission and the Circuit Court in condemning them.

It was harsh but possibly defensible legislation therefore to deny to the carriers who should be unsuccessful in maintaining the justice of their rates the right to suspend the orders of the trial Court pending an appeal. Such privilege, however, was permitted to all other litigants on the civil side of the Court, upon complying with the the terms of the Statute providing security against loss pending an examination of the decision of the trial Court in the only Court which then possessed the right of review.

But for the passage of the Judiciary Act of 1891 (26 Stat. 826,) the situation of appellee at present would be as follows: His bill would have been dismissed and his only appeal would have been directly to this Court.

And not until its judgment in revision of the decision of the trial Court could any order have been issued in the cause which appellee could desire to enforce, inasmuch as his bill had been dismissed.

IV.

THE JUDICIARY ACT OF 1891.

1.

It is not the purpose of appellant in this argument to discuss the question as to whether the *supersedeas* clause in the Inter-State Commerce Act applies to any appeal at all to the Circuit

Court of Appeals as distinguished from the "Supreme Court" for that view also has been effectively presented in the argument of counsel for the other appellants already referred to, (Mr. Baxter's brief, 7); nor is it the purpose of this appellant to discuss the question as to whether *supersedes* is prohibited in any case under the Inter-State Commerce Act unless the Commission and the lower Court agree, for that, too, has been discussed in the same brief, (page 7.) The case here will be treated as though the Act did apply to appeals to the Circuit Courts of Appeals, and as though any orders of the Trial Court which required execution were not stayed on appeal.

What, then, has been the effect of the passage of the Judiciary Act of 1891 upon appellee's rights? The object of this Act is thus described by this Court in the case of *McLish vs. Roff*, 141 U. S. 661, already cited:

"It is a matter of public history, and is manifest on the face of that Act that its primary object was to facilitate the prompt disposition of cases in the Supreme Court and to relieve it of the enormous over-burden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigation."

Accordingly the Judiciary Act, in the words of the Court in that case "provides for the distribution of the entire appellate jurisdiction of our national judicial system between the Supreme Court of the United States and the Circuit Court of Appeals therein established by designating the classes of cases in respect of which each of those Courts shall have final jurisdiction."

In the present case there is no doubt that the jurisdiction of the Circuit Court of Appeals is not final. (*Inter-State Commerce Com., vs. Atchinson*, 149 U. S. 264,) and appellee concedes (Appellee's brief, page 3,) that such is the case.

The cause is therefore not yet really decided, but is still under appeal to the Supreme Court.

The effect of the Judiciary Act of 1891 is simply to substitute two Courts of review in the place of one Court by inter-

posing the immediate Court of Appeals in such cases as the present, and when the Inter-State Commerce Act provides, supposing its *supersedeas* clauses to be operative, that "either party to a proceeding before the Circuit Court may appeal to the Supreme Court," but "such appeal shall not operate to stay or supersede the order of the Court," the result is, in such cases where there is a direct appeal under the Judiciary Act to the Supreme Court, that no order of the Circuit Court is suspended by such direct appeal. And in such cases as the present, where the decision of the Intermediate Court is not final, but appeal is taken from that Court to the Supreme Court, the order of the trial Court is still unsuspended by any appeal from its judgment, but it remains until ultimate decision by the Supreme Court of the United States.

2.

In the present case inasmuch as the bill was dismissed by the Trial Court, no order whatever was issued by the Court of first instance, but let us suppose that the decision of the trial Court had been in favor of the appellee and had directed the appellants to carry out the order of the Commission and to desist from enforcing the existing rates, and let us suppose that the railroad companies, the appellants here had appealed to the Circuit Court of Appeals. Grant for the sake of argument that such an appeal would not have stayed the order of the Circuit Court under the terms of the Judiciary Act of 1891, which substitutes the two Courts of intermediate and final resort for the Supreme Court; then also let it be granted that if the appellants here upon the decision of the Circuit Court of Appeals sustaining the Circuit Court, had appealed to this Court, then the perfection of such an appeal would also not stay the order of the Trial Court. Appellee, of course, would be satisfied with this. But, suppose, on the other hand, that the intermediate Court instead of sustaining the Trial Court in its orders had reversed the decision of the Circuit Court and directed the dismissal of the bill and the setting aside of the order enforcing the command of the Inter-State Commerce Commission. If the contention of appellee on this motion is correct, this would be an order of the Circuit Court of Appeals, which was not stayed or superseded by the

appeal to this Court, and the mandate of the Circuit Court of Appeals would issue to the Circuit Court directing the dismissal of the bill in spite of the perfection of an appeal to this Court.

The orders of the two Courts being inconsistent, and neither being superseded, it is to be presumed that the order of the higher Court is that which would be carried out, and appellee would obtain the very reverse of his wishes.

3.

APPELLANT'S VIEW.

The view of appellant, on the other hand, if its construction is correct, would present no such inconsistencies. By following the plain words of the Statute, supposing it unrepealed, and to apply to any case, it is manifest that they apply to the orders of the Circuit Court, and its decision, order, writs or process stand unaffected by appeals to this Court direct or to this Court in last resort by appeal from the Intermediate Court. From the allowance of an appeal by the Circuit Court until the case is disposed of here, there is only one appeal, and that appeal is equivalent to and in place of the "appeal to the Supreme Court" allowed by the Inter-State Commerce Act prior to the reorganization of the judiciary system under the Act of 1891.

V.

THE MANDATE OF THIS COURT.

The provisions of the Act of 1891 as to the remanding of cases on appeal conclusively sustain the view that when a case once reaches this Court by way of the Circuit Court of Appeals, whether by appeal, or writ of error, or by *certiorari* from this Court to the Circuit Court of Appeals, it is in effect an appeal from the Circuit Court, for under Section 10 of that Act the case is remanded, not to the Intermediate Court, but to the Court of first instance or Trial Court. Section 10 reads as follows :

"Section 10. That whenever on appeal, or writ of error or otherwise a case coming directly from the District Court or existing Circuit Court shall be reviewed and determined in the Supreme Court, the cause shall be remanded to the proper District or Circuit Court for further proceedings to be taken in pursuance of such determination.

"And whenever on appeal or writ of error or otherwise a case coming from a Circuit Court of Appeals shall be reviewed and determined in the Supreme Court, the cause shall be remanded by the Supreme Court to the proper District or Circuit Court for further proceedings in pursuance of such determination."

It will be seen that precisely the same course is required in cases brought directly here as in cases coming here by way of the Circuit Court of Appeals. The Intermediate Court is for all purposes affecting the final judgment non-existent when the case properly reaches this Court. It is only in cases in which the decision of the Circuit Court of Appeals is final, and where this Court does not bring up the case by *certiorari* that the Circuit Court of Appeals issues its mandate to the Court in which trial took place.

The provision as to such cases is as follows:

Section 10. * * * * "Whenever on appeal or writ of error or otherwise a case coming from a District or Circuit Court shall be reviewed and determined in the Circuit Court of Appeals in a case in which the decision in the Circuit Court of Appeals is final, such cause shall be remanded to the said District or Circuit Court for further proceedings to be there taken in pursuance of such determination."

VI.

INTERMEDIATE COURTS OF APPEAL.

Although the judicial system of the United States has always provided for intermediate Courts of Appeal in certain cases, yet no decisions can be found in the books which assist in the decision of the question raised here, and the introduction of intermediate Courts

in certain States has been too recent to allow of many decisions upon the subject in their Courts. The two leading text books on appeals, "Powell on Appellate Proceedings," and "Elliott's Appellate Procedure," do not treat of intermediate appellate Courts at all, and only the latest digests treat of the subject under a separate head.

Under the Judiciary Act of 1789, (Section 21—1 Stat. at L. 83.) an appeal was allowed from the District to the Circuit Court in common law, and equity and admiralty cases and an appeal from the Circuit Court to this Court, in all cases except cases at law.

U. S. vs. Goodwin, 7 Cranch 108. Wiscart vs. Dauchy, 3 Dallas 321. Sarchet vs. U. S. 12 Peters, 143.

After the abolition of the equity and common law jurisdiction in civil cases of the District Court, the jurisdiction of the Circuit Court as an intermediate Court of Appeal from the District Court was preserved in admiralty cases, up to the time of the Judiciary Act of 1891. As appeals in admiralty, however, are trials *de novo* and absolutely extinguish the decree below pending appeal, it is not surprising that there should be no decisions in the reports of this Court, which throw light upon the present question.

Yeaton vs. U. S. 5 Cranch 281.

The Lucille, 19 Wallace 73.

Again under the Bankrupt Act of 1867, (14 Stat. at L. 518.) an appeal was allowed from the decisions of the District Court to the Circuit Court in certain cases at law and in equity and an appeal from the Circuit Court to this Court, but the Act was of short duration and the appeals were few in number, and the right of appeal given to this Court under Section 9 of that Act was different in its nature from the jurisdiction now exercised by this Court over appeals from the Circuit Court passing by way of the Circuit Court of Appeals. Owing to the fact that the Supreme Court possessed, under the Bankrupt Act of 1867, no power to issue its mandate to the District or Trial Court, but was compelled to deal directly with the

Circuit Court, as though the case had arisen in that Court, the supervising jurisdiction of this Court was less direct and narrower than the appellate jurisdiction of the Supreme Court provided under the Act of 1891.

Stickney vs. Wilt, 23 Wallace, 150.

VII.

STAY OF PROCEEDINGS.

From the terms of Section 16 of the Inter-State Commerce Act, under consideration here, it will be seen that the words used are "stayed or superseded," and the Section also speaks of "any orders," "any writs or process." It would seem that these words were specially intended to cover all equity cases.

The present case is in the nature of a suit in equity, and it would seem that the rules prevailing in Courts of Equity would properly be considered in interpreting the words of the Section under consideration.

In the English practice, a stay of proceedings in equity anciently was operated by mere appeal to the House of Lords, and was subsequently in practice, obtained in the lower Court, as that was the Court which dealt directly with the property and the parties. The latter was the general rule in other jurisdictions in which an appeal did not suspend a decree.

Willan vs. Willan, 16 Vesey, 216.

Ticey vs. Coxe, 3 Madd, 278.

Green vs. Winter, 1 Johnson's Chancery, 80.

Pell vs. Ball, 1 Rich., Equity, 351.

Hovey vs. McDonald, 109 U. S., 150.

Kitchen vs. Randolph, 93 U. S., 88.

This Court, in the Slaughter House cases, 10 Wall., 273, recognized clearly the distinction between appeals in equity and a stay of proceedings thereon, and writs of error working a *supersedeas*.

It would seem, therefore, that the stay, if any, of orders, independently of the other words of the statute, should be the stay

of orders in the trial Court and not in the Circuit Court of Appeals.

VIII.

THE OPERATION OF THE JUDICIARY ACT.

Appellant has endeavored in a former part of this brief to show the reason for the adoption of legislation so harsh as that denying to litigants the right to suspend an order of the Trial Court.

Certainly no such condition of affairs now prevails as would induce this Court, unless plainly required to do so by the words of the statute, to extend these harsh provisions to appeals from the Circuit Court of Appeals, for the mischief is now remedied and appeals are heard without serious delay of which complaint could properly be made.

And it is submitted without going into the merits of the appeal that the present case illustrates particularly the harshness of the provisions of the Inter-State Commerce Act with regard to the denial of *supersedeas*; for if denied here the result would be that the decision of the Circuit Court, which appellant contends is in direct accord with the decision of this Court made at the present term in the case of *Inter-State Commerce Commission vs. Alabama Midland Railway Co.*, (168 U. S. 144,) would be set aside pending this appeal, and the decision of the Circuit Court of Appeals, founded upon the view now, it is submitted, over ruled that the competition of other markets does not create "the dissimilar circumstances and conditions" under which the carrier may discriminate—would prevail.

IX.

APPELLEE'S BRIEF.

1

With regard to so much of appellee's brief as contends that the provisions of the Inter-State Commerce Act still forbid an appeal to operate as a *supersedeas*, (Appellee's brief, 2 to 4 in-

clusive,) this appellant adopts the brief of counsel for the other appellants already referred to.

2.

With regard to so much of appellee's brief as seeks to show that the words of the Inter-State Commerce Act apply to appeals from the Circuit Courts of Appeals to this Court, it is submitted that it confuses an appeal from the Circuit Court of Appeals to the Supreme Court with an appeal from the Circuit Court. Here are the appellee's words: (Brief 7,)

"It only remains to inquire what provisions for bonds or
"other securities were of force at the time of the adoption of
"the Act of 1891. At that time as we have seen Section 16 of
"the Act to regulate commerce read and still reads that an appeal
"might be taken to the Supreme Court 'under the same regula-
"tions now provided by law in respect to security for such
"appeals. But such appeal shall not operate to stay or supersede
"the order of the Court or the execution of any writ of process
"thereon.' "

Appellee simply begins his quotation from the Inter-State Commerce Act at a point in the clause subsequent to the declaration that the appeals referred to were appeals from "the said Court," that is to say, the Circuit or Trial Court, and granting that there is no repeal of the *supersedeas* provisions of the Inter-State Commerce Act, the Trial Court does not mean the Intermediate Court, as appellant has endeavored in this argument to show.

It is respectfully submitted, therefore, that appellee's motion should be denied.

JOSEPH W. BARNWELL,

*Solicitor for the South Carolina and Georgia
Railroad Company, Appellant.*

APPENDIX "A."
JUDGE SIMONTON'S DECISION.

THE UNITED STATES OF AMERICA, }
DISTRICT OF SOUTH CAROLINA. }

In the Circuit Court—Fourth Circuit. In Equity.

H. W. Behlmer

vs.

The Louisville and Nashville Railroad, *et al.*

This is a proceeding in Equity brought to enforce a finding of the Inter-State Commerce Commission, under Section 5, of the Act to amend an Act to Regulate Commerce, approved March 2nd, 1889, (25 Statutes at Large 855.) This Section 5 amends Section 16 of the Amended Act which was approved 4th February, 1887, (24 Statutes at Large 379.)

The petitioner is a resident of Summerville, an incorporated town on the line of the South Carolina Railway Company, about twenty-two miles from Charleston, South Carolina.

He complained that he had been compelled to pay upon a shipment of two carloads of hay, from Memphis to Summerville, twenty-eight cents per hundred, whilst the through freight charge from Memphis to Charleston is but nineteen cents per hundred. He charged that this was in violation of Section 4 of the Act of 1887, the long and short haul clause. The Commission heard the case on the petition and answers, decided in favor of the petitioner and ordered the South Carolina Railway Company, then, and at the date of filing the petition, in the hands of a Receiver, to reduce the rate from Memphis to Summerville to 19 cents. The defendant the South Carolina Railway Company, by its Receiver, has not obeyed the order.

The facts of the case are, the two carloads of hay were shipped from Memphis, Tennessee, to Chattanooga, Tennessee; 310 miles over the Memphis and Charleston Railroad from Chattanooga to

Atlanta, Ga., 152 miles over the East Tennessee, Virginia and Georgia Railroad; from Atlanta to Augusta, Georgia, 171 miles over the Georgia Railroad; and from Augusta, Georgia, to Summerville, South Carolina, 115 miles. The through freight charge from Memphis to Charleston is 19 cents. In addition to this, the petitioner paid nine cents. In the through freight charge of 19 cents all these railroads participate. None of them but the South Carolina Railway had any interest in the nine cents. This is the rate of freight from Charleston to Summerville, approved by the Railroad Commissioners of South Carolina. All the railroads named are parties defendant. At the date of the transaction complained of, 17th August, 1892, the South Carolina Railway Company was in the hands of D. H. Chamberlain, Receiver; the railway property was sold under foreclosure of mortgage in the proceedings in which he was appointed Receiver, by D. H. Chamberlain as Special Master, he having been thereunto named. The sale was confirmed 24th April, 1894, the terms of sale complied with, the deed of conveyance executed shortly thereafter, to wit: 1st May, 1894, and the purchasers were put into possession, and afterward, the South Carolina and Georgia Railroad Company, under purchase from and conveyance by them, was put into absolute possession on 1st July, 1894. The cause was heard before the Commission. Its decision was rendered 27th June, 1894. It was served on D. H. Chamberlain, Receiver, some time in July, 1894. There is no evidence of any notice to or service on, or refusal or neglect to obey the order on the part of the South Carolina and Georgia Railroad Company, styled in these proceedings, the successor, assignee and purchaser of the South Carolina Railway Company, and its Receiver, Daniel H. Chamberlain.

At the threshold of the case, is a motion to dismiss these proceedings against the South Carolina and Georgia Railroad Company, for the want of this evidence above stated. As the testimony taken in the cause develops, and it is not disputed, the other roads made defendants, had no contract or agreement for through rates from Memphis to Summerville. The rate was to Charleston, a competitive point. Nor did any of the roads other than the South Carolina Railway Company share in the nine cents, over the nineteen cents per cwt. This excess went to the South Carolina Railway alone. This preliminary objection therefore is vital.

It is very clear that the South Carolina and Georgia Railroad Company did not become liable in these proceedings against the Receiver of the South Carolina Railway merely because it was the alienee of the purchaser at the foreclosure sale, or even were it the purchaser itself. (*Sullivan vs. Portland, &c., R. R. Co.*, 94 U. S. at page 610. *Hoard vs. Chesapeake and Ohio R. R. Co.*, 123 U. S. 222.) If it is so liable, the liability must arise from the terms of sale under which the purchase was made.

The petitioner relies upon the terms of the order of sale in the decree of foreclosure of the South Carolina Railway Company, which are in these words :

"The purchaser or purchasers at said sale shall as part of the consideration and purchase price of the property purchased, take said property upon the express condition, that he or they or their assigns will pay, satisfy and discharge any unpaid compensation allowed to the Receiver and all claims made against said Receiver and all obligations contracted and obligations incurred by the Receiver which may be contracted or incurred by the Receiver prior to the delivery of the possession of the property sold to the purchaser or purchasers and which shall not have been paid by the Receiver prior to such delivery of possession out of the income of the mortgaged property."

The language of this part of the decree clearly refers to pecuniary obligations. The purchasers are to pay, satisfy and discharge any unpaid compensation, all claims made against the Receiver and all obligations of the Receiver which shall not have been paid, &c.

The fifth section of the amended Act (1889) amended Section 16 of the amended Act (1887) imposes no punishment, pecuniary or otherwise, for disobeying the order of the Commission. It does inflict a fine upon the offending party if it disobey the order of the Circuit Court of the United States, if the Commission appeal to such Court for assistance, and that Court issue its injunction or other process commanding disobedience to the order of the Commission to cease. But in such case the punishment is in the nature of a contempt proceeding and the party

must be punished for his own act. It cannot be presumed that the South Carolina and Georgia have the same rates as the Receiver had when he controlled the property. We cannot presume that this new company, wholly disconnected with the Receiver, had adopted all his alienees. *Non constat* that it would disobey the Commission if it were served with an order from it. Clearly the refusal of the Receiver made nearly two months after the property had been conveyed, and nearly one month after the South Carolina and Georgia Railroad Company were in exclusive possession, in their own right, cannot bind that Company.

The petition in this Court avers "that the findings and conclusions of the Commission in this case, together with a copy of the order and notice, were delivered to each and all of the parties to the cause, their Receivers and successors in operation."

On this averment it bases its prayer for temporary and permanent injunction against the South Carolina and Georgia Railroad Company, as successors in operation of the Receiver. The evidence fails to establish this most material averment. So far as the South Carolina and Georgia Railroad is concerned, and as to the South Carolina and Georgia Railroad Company, the prayer of the petition is *coram non judice*. The only ground of jurisdiction against the South Carolina and Georgia Railroad Company is that having been served with copy of the order of the Commission it refused or neglected to obey it. The record discloses no such service, refusal or neglect.

But besides the South Carolina and Georgia Railroad Company there are other defendants. They have answered and have met the issue presented by the petition. The questions made are of deep interest and require solution.

The answer in which all the defendants join, except the South Carolina and Georgia Railroad Company, admits the hearing before the Commission and the result, denies as well that it had the effect of a judicial decision, as its correctness in law or fact. It admits that the joint rate agreed upon between the defendants for hay, from Memphis to Charleston is 19 cents per cwt., but

it denies that there is anything more than an arrangement between independent companies, each of which has a specified and distinct interest in this rate. It denies that there is any agreement for a through rate to Summerville, South Carolina, from Memphis. It avers that this rate of 19 cents per cwt. is reasonable. That it is the result not only of competition between the roads charging it, but of competition at Charleston with other all railroad routes, with rail and water transportation, and with all water transportation. That the rate on hay to Summerville is made up of this 19 cents per cwt through charge, which alone is divided between the defendants in definite proportions, and of nine cents per cwt. charged as a local rate on the South Carolina Railroad between Charleston and Summerville. That the through rate greatly exceeds what the aggregate of local rates would be, and that the local rate of nine cents has the approval of the Railroad Commission of South Carolina, and that it is reasonable.

The controlling question in this case is: Have these defendants violated the provisions of the 4th Section of the Act of Congress, approved 4th February, 1887. "An Act to Regulate Commerce, 24 Statutes, 379. Section 4: That it shall be unlawful for any common carrier, subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance.

Provided, however, that upon application to the Commission appointed under the provisions of this Act, such common carrier may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property. And the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from operation of this section of this Act."

The defendants did not avail themselves of this proviso, notwithstanding that the Commission opened the door for them to do so. So the question in this case is. Was this charge of 28 cents per hundred from Memphis to Summerville made by these defendants, and was it made under substantially similar circumstances and conditions as the charge of 19 cents per hundred from Memphis to Charleston; the distance from Memphis to Summerville being shorter than the distance from Memphis to Charleston, both Summerville and Charleston being on the same line and in the same direction?

It would appear from the evidence in this case that these defendants had no common controlling head, that they were independent of each other, and that acting independently they had so arranged their charges of freight on hay and articles of this character, that 19 cents per hundred would be divided between them for transportation between Memphis and Charleston. They had similar contracts from Memphis to Chattanooga, to Atlanta to Augusta. But these contracts did not include any intermediate points. In the case at bar all that was received by all these connecting roads was 19 cents per hundred. The South Carolina Railway Company shared in this. In addition that this Railway Company charged nine cents because the shipment was to Summerville, and this nine cents it shared with no one. Strictly speaking, therefore, the defendants did not charge for anything but transportation between Memphis and Charleston. There was no arrangement between them for any other through rate to any point in South Carolina than Charleston, and no authority in any one to change or enlarge the terms of the contract. Certainly the shipping agent in Memphis could not do it. He may very well have said to one who desired to ship hay into South Carolina, and who wished to avoid the local rates on each road, I can do this for you, we have through rates to competitive points, I can give you the benefit of the through rate to Augusta, or I can give you the through rate to Charleston. My authority goes no further. I can put your freight within reach of you on the South Carolina Railway, and can bind this road only as to the rate to Charleston. When you get it there you may contract with the South Carolina Railway Company. The South Carolina Railway Company itself could say to its contracting roads, we are

perfectly willing to contract with you for a through rate to Charleston. There we meet competitive carriers and competing markets, and if we do not meet you in lowering the through rates you, and we as well, will lose business. But we will not agree to through rates to points where we have no competition and especially to points on our road. Freight to these points and charges for transportation are our own business, and no one else is concerned in it. The mandate of the commission, therefore, to these defendants, other than the South Carolina Railway Company, directs them to do that which it is out of their power to do, and is nugatory and void.

But if we assume, for the sake of argument, that all the defendants are affected by this charge, does it violate the 4th Section of the Act above quoted?

Judge Cooley, *in re* L. & N. R. R. Co. 1 I. C. C. Reports 57, says: "The charging or receiving greater compensation for the shorter than for the longer haul is sure to be forbidden only where both are under substantially the same circumstances and conditions. And therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the Statute is not violated." This is quoted with approbation by the United States Circuit Court, Southern District California. *Inter-State Commerce Commission vs. A. F. & S. F. R. Co.*, 50 Fed. Rep., 295.

When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley in the same case answers this question. "Among other things in cases where the circumstances and condition of the traffic were affected by the element of competition and where exceptions might be a necessity if the competition were to continue. And water competition was beyond doubt, especially in view." In the case from 50 Fed. Rep. above cited, this is one of the Rubrics: "Los Angeles, California, is a point to which there is active competition in certain kinds of freight between several transcontinental railway lines, direct or by water via Vancouver and San Francisco, also by ocean freights via Aspinwall and the Straits of Magellan, from points east of

the Missouri River, and a through rate on the same kind of freight, lower than to San Bernardino, an intermediate non-competitive point 60 miles from Los Angeles, on one of the competing railroad lines is not prohibited by the Act, since the circumstances and conditions were substantially dissimilar."

The circumstances of the case at bar are closely like those of the case just quoted. Charleston is a competitive point between all railroad routes, all railroad routes partly by rail and partly by water, and routes all water. If the defendants had not consented with each other to lower the rate, no hay whatever would come from the hay producing territory tributary to Memphis, and all the Southeast Atlantic States would be compelled to rely on other portions of the West, North or Northeast for hay.

The evidence clearly shows that the rate to Charleston was forced down by this competition. But this is an advantage to all the territory tributary to Charleston, and all stations share in it. No such competition exists at Summerville, a small inland town. If it and others like it were permitted to share in the circumstances and conditions surrounding Charleston and to get the benefit of the competition which Charleston enjoys, and they have not, then *ex-necessitate* the South Carolina Railway will be called upon to elect between its through business and its local business, and in this election to give up the former. Thus all stations on the line of road will pay local freight on hay, and the market to the extent of imports from Memphis will be destroyed. The Inter State Commerce law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade.

The bill is dismissed.

22nd January, 1896.

CHARLES H. SIMONTON,

Circuit Judge.

APPENDIX "B,"

An Act to amend an Act to Regulate Commerce. Approved March 2d, 1889. 25 Stat. at Large, 855.

"SECTION 5. That Section 16 of said Act is hereby amended so as to read as follows: That whenever any common carrier, as defined in and subject to the provisions of this Act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this Act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition to the Circuit Court of the United States sitting in Equity, in the Judicial District in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be.

And the said Court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the Court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the Court shall direct.

And said Court shall proceed to hear and determine the matter speedily as a Court of Equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such Court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the Court may think needful to enable it to form a just judgment in the matter of such petition.

And on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such Court, on such hearing, or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such

Court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same.

And in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such Courts to issue writs of attachment, or any other process of said Court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, Receiver or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise, and said Court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory, or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable as the Court shall direct, either to the party complaining or into Court, to abide the ultimate decision of the Court, or into the Treasury, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in *personam* in such Court.

When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said Court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the Court or the execution of any writ or process thereon, and such Court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable.

Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the Courts of the United States.

" If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth Section of this Act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the Circuit Court of the United States sitting as a Court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said Court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty or more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition and of said order upon each of the defendants and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid.

At the trial the findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury, the Court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the Court shall try the issues in said cause and render its judgment thereon.

If the subject in dispute shall be of the value of two thousand dollars or more, either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal, but such appeal must

be taken within twenty days from the day of the rendition of the judgment of said Circuit Court.

If the judgment of the Circuit Court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee to be fixed by the Court which shall be collected as part of the costs in the case.

For the purposes of this Act excepting its penal provisions the Circuit Court of the United States shall be deemed to be always in session."

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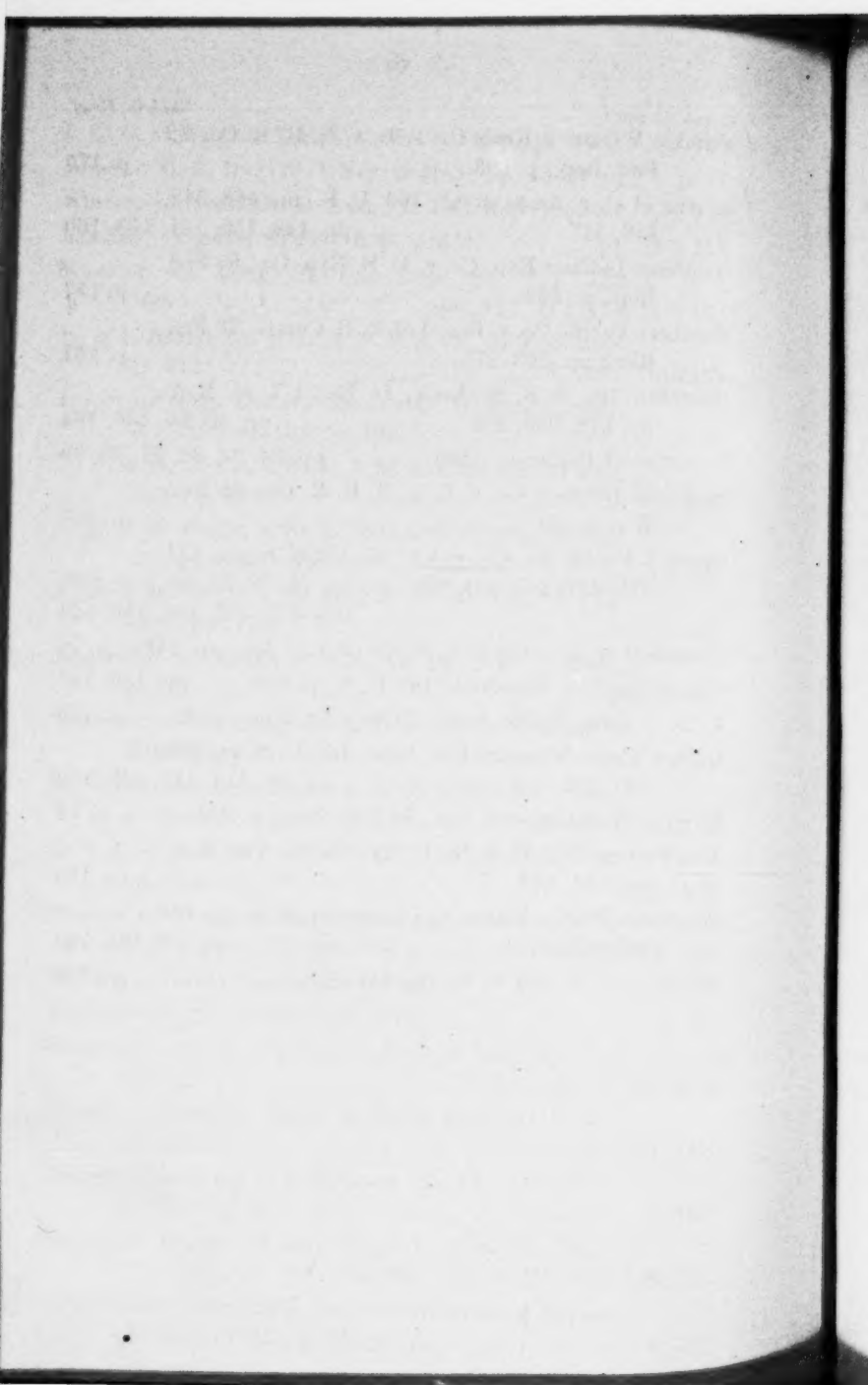
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SUPREME COURT OF THE UNITED STATES

October Term, 1898.

No. 244.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL, Appellants,

VS.

HENRY W. BEHLMER, Appellee.

APPEAL

FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

PART I.

STATEMENT OF CASE.

I.

PETITION BEFORE THE COMMISSION.

On December 29, 1892, the Appellee, Henry W. Behlmer, filed a petition before the Interstate Commerce Commission against the Appellants, the Memphis & Charleston Railroad Company; the East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company; Henry Fink and Charles M. McGhee, as Receivers of the East Tennessee, Virginia & Georgia Railway Company and the Memphis & Charleston Railroad Company; Daniel H. Chamberlain, as Receiver of the South Carolina Railway Company; the Central Railroad & Banking Company of Georgia, and the Louisville & Nashville Railroad Company, as lessees of the Georgia Railroad; and H. M. Comer, as Receiver of the Central Railroad & Banking Company of Georgia.

Said petition alleged, in brief, that said Memphis & Charleston R. R. extends from Memphis, Tenn., to Chattanooga, Tenn., a distance of 310 miles; that said E. T., V. & G. Ry. extends from Chattanooga, Tenn., to Atlanta, Ga., a distance of 152 miles; that said Georgia R. R. extends from Atlanta to Augusta, Ga., a distance of 171 miles; and that said South Carolina Ry. extends from Augusta, Ga., to Summerville, S. C., a distance of 115 miles; that said defendants are common carriers, under a common control, management or arrangement, for continuous carriage or shipment, and are engaged in the transportation of passengers and property wholly by railroad between the above-mentioned points.

Said petition further alleged that Summerville is an incorporated town of considerable size and importance, situated on the South Carolina Railway, in the State of South Carolina, and distant 22 miles inland from Charleston, S. C.; that petitioner carries on a wholesale hay and grain business in said town, and is thus 22 miles nearer than Charleston to western points, where grain shipments originate; that on August 17, 1892, he received at Summerville, S. C., two carloads of hay, which he had ordered from Memphis, Tenn.; that said two carloads of hay were carried from Memphis to Summerville over the railroads aforesaid; that said two carloads of hay were hauled from Memphis to Summerville over the same line, in the same direction as Charleston, S. C., and under substantially similar circumstances and conditions as Charleston traffic; that the haul from Memphis to Summerville was, and is, 22 miles shorter than the haul from Memphis to Charleston, and the said shorter distance was, and is, included within the longer distance; that said petitioner was forced to pay 28 cents per 100 lbs. on said shipment of hay to Summerville, the shorter distance, whereas the rate to Charleston, the longer distance, was, and is, 19 cents per 100 lbs.; that this was in violation of the Fourth Section of the Act to Regulate Commerce; that said additional 9 cents per 100 lbs. which petitioner was forced to pay is a so-called local rate from Charleston to Summerville, a distance of 22 miles, whereas the through rate from Memphis to Charleston is 19 cents per 100 lbs., the distance being 771 miles; that said local rate is imposed by the South

Carolina Ry. Co., or its Receiver, who now operates the road, or by the Southern Ry. & S. S. Association.

Said petition further alleged that said so-called local rate of 9 cents per 100 lbs. for 22 miles is excessive and unreasonable, and that the aggregate charge of 28 cents per 100 lbs. from Memphis to Summerville is excessive and unreasonable, and in violation of Section 1 of the Act to Regulate Commerce; that the Georgia R. R. is operated under a joint lease to the Louisville & Nashville R. R. Co. and the Central R. R. & Banking Co. of Georgia, which last named company is in the hands of H. M. Comer, its Receiver; that all the above-mentioned lines are members of the Southern Ry. & S. S. Association; that the discrimination and excessive rates against Summerville exist not only on hay, as above set forth, but on all articles of Interstate Commerce coming to that place, much to the detriment and disadvantage of the town, and the business of its merchants.

Petitioner prayed, on behalf of himself and many others, that a notice issue to said railroads to cease and desist from violations of the law, as above set forth, and all similar violations.

Trans., pp. 7 to 9.

II.

ANSWERS BEFORE THE COMMISSION.

Answers were filed by Charles M. McGhee and Henry Fink, Receivers of the East Tennessee, Virginia & Georgia Ry. Co. and the Memphis & Charleston R. R. Co., Trans., pp. 16 to 17; by D. H. Chamberlain, Receiver of the South Carolina Ry. Co., Trans., pp. 13 to 16; and the Louisville & Nashville R. R. Co. and the Central R. R. & Banking Co. of Georgia, Assignees of the Lessee of the Georgia R. R. Trans., pp. 10 to 13.

The answer of the Louisville & Nashville R. R. Co. and the Central R. R. & Banking Co. of Georgia admitted that the railroads mentioned in the petition were common carriers, and were severally engaged in the transportation of persons and property

from Memphis, Tenn., to Charleston, S. C., under an agreement or arrangement for the continuous carriage or shipment of through freight from Memphis to Charleston, at certain agreed through rates; but it denied that they were under any common control or management.

Said answer admitted that Summerville is situated on the South Carolina Ry., and is distant 22 miles inland from Charleston; that the haul from Memphis to Summerville is 22 miles shorter than the haul from Memphis to Charleston, and that said shorter distance is included in the longer distance.

Said answer admitted that a greater compensation in the aggregate was received for the transportation of said two carloads of hay from Memphis to Summerville than would have been charged for the same if they had been transported to Charleston.

Said answer denied that the aggregate charge of 28 cents per 100 lbs. on hay from Memphis to Summerville is excessive or unreasonable; and it also denied that the local rate of 9 cents per 100 lbs. charged by the South Carolina Ry. Co., or its Receiver, between Charleston and Summerville is unjust or unreasonable.

Said answer denied that the acts complained of in the petition are in violation of the Fourth Section of the Act to Regulate Commerce; and it based said denial upon the following facts, which are distinctly averred in said answer:

First. That Summerville is a local station on the South Carolina Ry.; that it is not on any water route, and has but one railroad, and therefore it does not have the advantage of competition between carriers.

Second. That the South Carolina Ry. is not compelled by competition at Summerville to choose between a reasonable rate, and a rate which is much below what would otherwise be reasonable.

Third. That at Charleston there exists competition between the following rail routes running between Memphis and Charleston:

Route No. 1: Memphis & Charleston R. R.; East Tennessee, Virginia & Georgia R. R.; Savannah, Florida & Western Ry.; and Charleston & Savannah Ry.

Route No. 2: Memphis & Charleston R. R.; Western & Atlantic R. R.; Central R. R. of Georgia; Port Royal & Augusta R. R.; and Charleston & Savannah Ry.

Route No. 3: Memphis & Charleston R. R.; Western & Atlantic R. R.; East Tennessee, Virginia & Georgia R. R., or Georgia Central R. R.; Seaboard Air Line; Clinton, Newberry & Laurens R. R.; and the Atlantic Coast Line.

Route No. 4: Kansas City, Memphis & Birmingham R. R.; Central R. R. of Georgia; Port Royal & Augusta R. R.; and Charleston & Savannah Ry.

Route No. 5: K. C., M. & B. R. R.; Georgia Pacific R. R.; Richmond & Danville R. R.; and Atlantic Coast Line.

Route No. 6: K. C., M. & B. R. R.; Louisville & Nashville R. R.; Alabama Midland Ry.; Savannah, Florida & Western Ry.; and Charleston & Savannah Ry.

Route No. 7: Louisville & Nashville R. R.; Nashville, Chattanooga & St. Louis Ry.; Western & Atlantic R. R.; Georgia R. R.; and South Carolina Ry.

Route No. 8: Louisville & Nashville R. R.; Nashville, Chattanooga & St. Louis Ry.; Western & Atlantic R. R.; Seaboard Air Line, and the Atlantic Coast Line, or Port Royal & Western Carolina Ry.; Port Royal & Augusta R. R.; and Charleston & Savannah Ry.

That said lines are not only potential, but active competitors for business between Memphis and Charleston.

Fourth. That Charleston is a port on the Atlantic coast, easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other Eastern ports, from which hay is shipped by water; and if the rail lines from Memphis to Charleston charge rates to Charleston as high as the rate to Summerville, (although

the latter rate is in itself reasonable), no hay would be brought from Memphis to Charleston, and Charleston would be supplied with hay from North Atlantic ports; that the railroads running from Memphis to Charleston would lose the hay business, and Memphis would lose a hay market at Charleston.

Fifth. That rates on Western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual existing water competition. Western produce, such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia and Baltimore, over continuous water routes via the lakes and canal, or over combined rail and water routes.

Sixth. That all the rail lines seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water routes, or by the combined rail and water routes; that the all-rail routes make their rates as much higher as the difference in service will permit, and those rates are correspondingly adjusted from all Western points, such as Evansville, Cairo, St. Louis, Memphis, etc. That at present, the all-rail rate from Chicago to Charleston on hay, for instance, is 33 cents per 100 lbs.; from St. Louis, 28 cents; from Louisville, Evansville and Cairo, 23 cents; and from Memphis 19 cents.

Seventh. That the rate from Memphis to Charleston on hay is forced upon the defendant lines by actual, existing water competition, and by other competition which is also beyond defendants' control.

That the controlling element in said competition is the lake, canal, and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston.

Trans., pp. 10 to 13.

III.

REPORT AND OPINION OF THE COMMISSION.

All the testimony that was taken in the case by the defendants was taken before the Commission; and it was directed to the support of the denials and averments contained in the answers.

The Commission filed its report and opinion, in which it stated the substance of the petition and answers aforesaid, and certain facts and conclusions; but it utterly failed to find whether the following were facts or not:

First. It failed to find whether the charge of 28 cents per 100 lbs. on hay from Memphis to Summerville is reasonable or unreasonable, just or unjust.

Second. It failed to find whether the local rate of 9 cents per 100 lbs. on hay charged by the South Carolina Ry., or its Receiver, between Charleston and Summerville is reasonable or unreasonable, just or unjust.

Third. It failed to find whether Summerville has more than one railroad, or whether it is located upon a water route or whether it has the advantage of any kind of competition between carriers.

Fourth. It failed to find whether there exists any competition between the eight different all-rail routes mentioned in the answers as running between Memphis and Charleston.

Fifth. It failed to find whether, if the rail lines from Memphis to Charleston were to charge rates to Charleston as high as the rate to Summerville, no hay would be brought from Memphis to Charleston; and whether Charleston would be supplied with hay from, or through the North Atlantic ports.

Sixth. It failed to find whether, if the rail lines from Memphis to Charleston were to charge rates to Charleston as high as the

rate to Summerville, said rail lines would lose the hay business, and Memphis would lose a hay market at Charleston.

Seventh. It failed to find whether the rates on Western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual, existing water competition.

Eighth. It failed to find whether Western produce, such as hay, grain, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia and Baltimore, over continuous water routes via the lakes and canal, or over combined rail and water routes.

Ninth. It failed to find whether the rail lines seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water routes, or by the combined rail and water routes.

Tenth. It failed to find whether the all-rail routes make their rates as much higher as the difference in service will permit; and whether those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc.

Eleventh. It failed to find whether the rate from Memphis to Charleston on hay is forced upon the defendant lines by actual, existing water competition, or by other competition which is beyond the defendants' control.

Twelfth. It failed to find whether the controlling element in said competition is by lake, canal, and ocean transportation between Chicago and Charleston; or by lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or by rail transportation from Chicago to Baltimore, Philadelphia or New York, and thence by ocean to Charleston.

Trans., pp. 17 to 23.

IV.

The Commission announced, in its report and opinion, the following conclusions of law :

First. That the fact that there may be competition for the carriage of hay from Memphis to Charleston, by lines *which are subject to the Act*, does not justify the defendant carriers in departing from the general rule of the Fourth Section, *upon their own motion*.

Trans., pp. 21, 22.

Second. That the fact that hay may be carried to Charleston by various rail and water, or part rail and part water routes, *from points other than Memphis*, does not justify the defendant carriers in departing from the general rule of the Fourth Section, *upon their own motion*.

Trans., pp. 21, 22.

Third. That because Charleston is an important seaport and railroad center, and hay may be, and is, carried there from various points, is not a sufficient reason for a departure from the general rule of the Fourth Section, by the defendant carriers upon their own motion.

Trans. p. 22.

Fourth. That water competition, to justify lower long haul rates, must exist between the point of shipment, and the longer distance point of destination.

Trans., p. 22.

Fifth. That the competition of markets does not justify the carriers in departing from the general rule of the Fourth Section, *upon their own motion*.

Trans., p. 22.

Sixth. That one transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could, and

would, perform the service alone, if the former did not undertake it.

Trans., p. 22.

Seventh. That if the rates from Memphis to Charleston are remunerative, the defendants cannot, in the face of the prohibition of the Fourth Section, and the provision in that section for the issuance of relieving orders, assume to say that such rates, though profitable on Charleston traffic, are insufficient for the transportation of carload quantities to a shorter distance point, on the same line, and in the same direction.

Trans., p. 22.

Eighth. The Commission ordered the defendants to desist "from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities carried by them, under circumstances and conditions similar to those appearing in this case, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than they contemporaneously charge and receive for the transportation of hay and such other commodities, respectively, for the longer distance, from Memphis aforesaid to Charleston, in the State of South Carolina."

Tans., p. 24.

V.

PROCEEDINGS IN THE CIRCUIT COURT.

The defendants having declined to obey said order of the Commission, the said H. W. Behlmer filed a petition in the Circuit Court of the United States for the Fourth Circuit, Eastern District of South Carolina, to compel the defendants to obey said order.

Said petition in the United States Circuit Court was answered by the defendants thereto; and the testimony which had been taken before the Commission was, by stipulation, used in the Circuit Court.

On December 11, 1895, the cause was heard in the Circuit Court before Circuit Judge Charles H. Simonton, who delivered a written opinion, and the bill or petition was dismissed, Trans., p. 113; and from that decree the said Behlmer appealed to the United States Circuit Court of Appeals for the Fourth Circuit.

Trans., p. 114.

71. Fed. Rep., 835. Behlmer vs. L. & N. R. R. Co.

VI.

FINDING OF FACTS BY THE CIRCUIT COURT.

The Circuit Court found the following facts to be true, viz.:

First. That petitioner is a resident of Summerville, an incorporated town on the line of the South Carolina Ry., about 22 miles from Charleston.

Trans., p. 108.

Second. That petitioner's two carloads of hay were shipped from Memphis, Tenn., to Chattanooga, Tenn., 310 miles, over the Memphis & Charleston R. R.; from Chattanooga, to Atlanta, Ga., 152 miles, over the East Tennessee, Virginia & Georgia R. R.; from Atlanta to Augusta, Ga., 171 miles, over the Georgia R. R.; and from Augusta, Ga., to Summerville, S. C., 115 miles, over the South Carolina Railway.

Trans., p. 108.

Third. That the through freight charge on hay from Memphis to Charleston is 19 cents per 100 lbs.

Trans., p. 108.

Fifth. That Charleston is a competitive point between all-rail routes; rail-and-water routes; and all-water routes.

Trans., p. 112.

Sixth. That "if the defendants had not consented with each other to lower the rate [from Memphis to Charleston,] no hay whatever would come from the hay-producing territory tributary to Memphis; and all the

Southeast Atlantic States would be compelled to rely on other portions of the West, North or Northeast for hay.

"The evidence clearly shows that the rate to Charleston was forced down by this competition.

"No such competition exists at Summerville, a small inland town."

Trans., p. 112.

Seventh. That the 9 cents which petitioner was charged in addition to said 19 cents, was the rate of freight from Charleston to Summerville, approved by the Railroad Commissioners of South Carolina.

Trans., p. 108.

VII.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals reversed the decree of the Circuit Court, and ordered the same to be remanded to the Circuit Court, with instructions to enter a decree requiring the present appellants and each of them to desist from charging, demanding, collecting or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged for the transportation of hay, and other commodities respectively, for the long distance aforesaid to Charleston, in the State of South Carolina. Said Circuit Court was ordered to see that the requirements of said decree were immediately carried into effect, and enforced as provided for in the Act to Regulate Commerce; and to direct that the present appellants pay all costs, and in addition thereto such reasonable fee to the present appellee's counsel as the Court might under the circumstances of the case think proper and just.

Trans., p. 137.

The present appellants presented to said Circuit Court of Appeals a petition for rehearing.

Trans., pp 138 to 141.

The rehearing asked for, was refused.

Trans., p. 154.

Thereupon, the present appellants prayed for and obtained an appeal to this Court.

Trans., p. 161.

The case was decided in the Circuit Court of Appeals by a divided Court. The opinion of the majority will be found on pages 124 to 133; and the opinion of the minority will be found on pages 134 to 136, of the Transcript.

VIII.

ASSIGNMENT OF ERRORS.

The present appellants filed in the Circuit Court of Appeals their assignment of errors. Trans., pp. 155 to 158. It is as follows:

“On the 17th day of January, in the year of our Lord, eighteen hundred and ninety eight, came the said appellees, the Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia, and H. M. Comer, its Receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Charles M. McGhee, as Receivers of the last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; and the South Carolina Railway Company and its Receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, by Ed. Baxter and Joseph W. Barnwell, their solicitors, and say that in the decree rendered by said Circuit Court of Appeals in the above-entitled cause, on the 6th day of November,

1897, and in the record and proceedings in said cause in said Court, there is manifest error in this, to-wit:

I.

That said Circuit Court of Appeals erred in reversing and remanding the decree rendered in the above-entitled cause on January 22, 1896, by the Circuit Court of the United States for the District of South Carolina.

II.

That said Circuit Court of Appeals erred in instructing said Circuit Court to enter a decree herein, requiring the appellees and each of them to desist from charging, demanding, collecting or receiving any greater compensation in the aggregate, for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities respectively for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said Act to Regulate Commerce; and to further direct that the appellees pay all costs in this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that Court may, under the circumstances of this case, think proper and just.

III.

That said Circuit Court of Appeals erred in decreeing that said appellees should pay the costs of said cause in said Circuit Court of Appeals.

IV.

That said Circuit Court of Appeals erred in not affirming said decree rendered in said cause, January 22, 1896, by said Circuit Court of the United States for the District of South Carolina.

V.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that the matters of equity alleged in the bill,

filed in the above-entitled cause, are fully denied in the answers, and are not sustained by the proof, and that said bill be dismissed.

VI.

That said Circuit Court of Appeals erred because it, in effect, decided that the rates charged by the above-named appellees for the transportation of hay and other commodities carried by them from Memphis, Tenn., to Summerville, S. C., are unjust and unreasonable.

VII.

That said Circuit Court of Appeals erred because it, in effect, decided that the transportation of hay and other commodities carried by the above-named appellees, from Memphis, Tenn., to Summerville, S. C., is a like and contemporaneous service, under substantially similar circumstances and conditions, with the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tenn., to Charleston, S. C.

VIII.

That said Circuit Court of Appeals erred because it, in effect, decided that as the above-named appellees make a greater charge in the aggregate on hay and other commodities, carried by them from Memphis, Tenn., to Summerville, S. C., than they make on such freight from Memphis, Tenn., to Charleston, S. C., they thereby give to Charleston, S. C., and its traffic, an undue or unreasonable preference or advantage; and subject Summerville, S. C., and its traffic, to an undue or unreasonable prejudice or disadvantage.

IX.

That said Circuit Court of Appeals erred because it, in effect, decided that the transportation by the above-named appellees, of hay and other commodities carried by them from Memphis, Tenn., to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellees, of hay and other commodities carried by them from Memphis, Tenn., to Charleston, S. C.

X.

That said Circuit Court of Appeals erred because it, in effect, decided that the Interstate Commerce Commission has the power to fix the rates of transportation to be charged by the above-mentioned appellees for carrying freight from Memphis, Tenn., to Summerville, S. C.

XI.

That the said Circuit Court of Appeals erred in directing that a counsel fee should be paid to the counsel of appellant in said Court, and in not deciding that the Act known as the Interstate Commerce Act, in so far as it directs the payment of a counsel fee to the successful party complaining against railroad corporations engaged as carriers of interstate commerce, while it provides for no similar counsel fee to such railroad companies in case judgment be in their favor, is unconstitutional and void, inasmuch as it deprives such railroad companies of their property without due process of law.

XII.

That said Circuit Court of Appeals erred in not sustaining the decree of the Circuit Court dismissing the petition of appellant as against the South Carolina & Georgia Railroad Company, appellee, on the ground that the said company was not served with the order of the Commission requiring said company to desist from charging any greater compensation in the aggregate for transportation of hay or other commodities from Memphis to Summerville than that contemporaneously charged and received from Memphis to Charleston.

XIII.

That said Circuit Court of Appeals erred in deciding that there was any proof whatever of the service of a copy of the order of the Interstate Commerce Commission made in said cause upon the appellee, the South Carolina & Georgia Railroad Company; and in not deciding that it was beyond the power of the Circuit Court after dismissing the petition of appellant to alter, correct or amend said decree after the term had expired in which the decree dismissing said petition was filed.

XIV.

That said Circuit Court of Appeals erred in reversing the decree of the Circuit Court which found that the appellee, The South Carolina & Georgia Railroad Company, was not bound by the proceedings before the Interstate Commerce Commission brought against D. H. Chamberlain, Receiver, of the South Carolina Railway Company, unless proof was made of the service upon said appellant of a copy of the order of said Interstate Commerce Commission, and in deciding that the purchase at a foreclosure sale of the property of the South Carolina Railway Company by a committee of its mortgage bondholders and the conveyance of said property to a new corporation, the South Carolina & Georgia Railroad Company, was a mere change of name.

Wherefore the above-named appellees, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its Receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as Receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia and Georgia Railway Company; the South Carolina Railway Company, and its Receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, pray that the said decree of said United States Circuit Court of Appeals for the Fourth Circuit, rendered November 6, 1897, be reversed and that said Court be ordered to enter a decree affirming the said decree rendered on the said 22d day of January, 1896, in the above-entitled cause by the said Circuit Court of the United States for the District of South Carolina.

ED. BAXTER,

Solicitor for said Appellees, as of Record.

JOSEPH W. BARNWELL,

Solicitor for South Carolina & Georgia Railroad Company."

PART II.

STATEMENT OF FACTS.

IX.

CHARLESTON AND SUMMERVILLE.

Summerville has a population of 2,219. It is situated on the South Carolina Ry., 22 miles inland from Charleston. It is not situated on any water course, and has but one railroad.

Trans., p. 61.

Charleston has a population of 44,955. It is the center of three railroad lines. It situated on the ocean; and is at the junction of Ashley and Cooper Rivers, both of which are navigable.

X.

THE HAY-PRODUCING TERRITORIES.

There are three hay-producing territories from which Charleston can be, and is, supplied.

First. The territory contiguous to Boston, New York, Philadelphia and Baltimore.

Second. The territory contiguous to Chicago.

Third. The territory contiguous to Memphis.

Trans., pp. 63, 64, 71, 72.

The territory contiguous to Boston, New York, Philadelphia and Baltimore, designated as the "Eastern Territory," is composed of the following States, and, as shown by the United States census of 1890, their production of hay is as follows :

Maine	1,192,228	tons.
New Hampshire.....	659,368	"
Vermont	1,205,953	"
Massachusetts	793,167	"
Rhode Island.....	101,392	"
Connecticut	612,906	"
New York.....	6,675,658	"
New Jersey.	661,791	"
Pennsylvania.....	4,331,582	"
Total.....	16,234,045	"

The territory contiguous to Chicago, designated as "Chicago Hay Territory," is composed of the following States, and parts of States, and, as shown by said census, their production of hay is as follows :

North Dakota	531,472	tons.
South Dakota	1,541,524	"
Minnesota	3,135,241	"
Wisconsin	2,981,521	"
Michigan	2,385,155	"
Eastern Iowa.....	3,632,350	"
Northern Illinois.....	2,455,552	"
Northern Indiana	1,370,522	"
Total.....	18,033,337	"

The territory contiguous to Memphis, designated as "Memphis Hay Territory," is composed of the following States, and parts of States, and, as shown by said census, their production of hay is as follows :

Nebraska	3,115,398	tons.
Western Iowa.....	3,632,350	"
Kansas	4,854,960	"
Missouri.....	3,567,635	"
Southern Illinois.....	2,455,552	"
Southern Indiana.....	1,370,522	"
Total.....	18,996,417	"

The following diagram (A) shows the three territories from which Charleston can be, and is, supplied with hay :

DIAGRAM A.



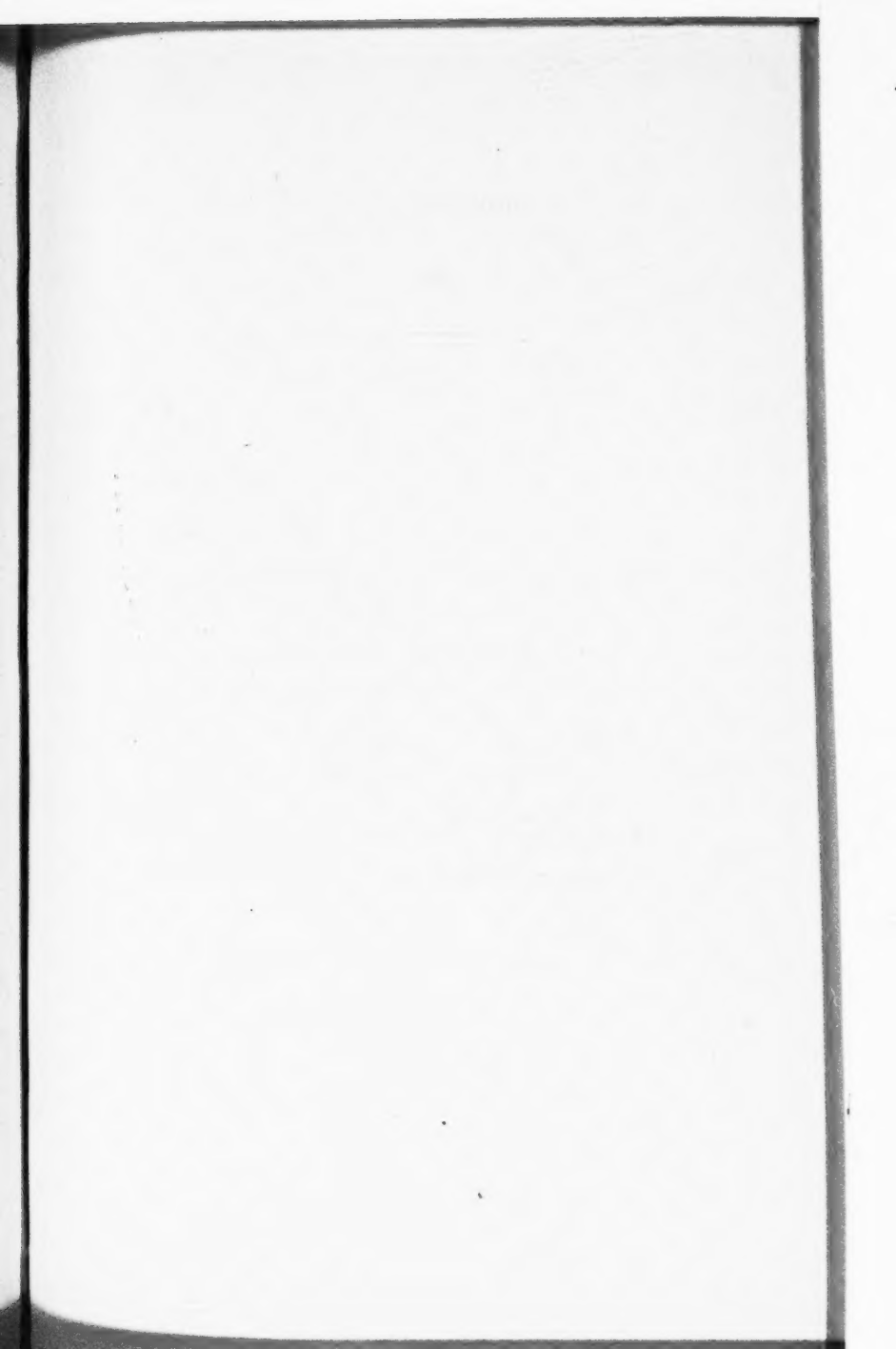
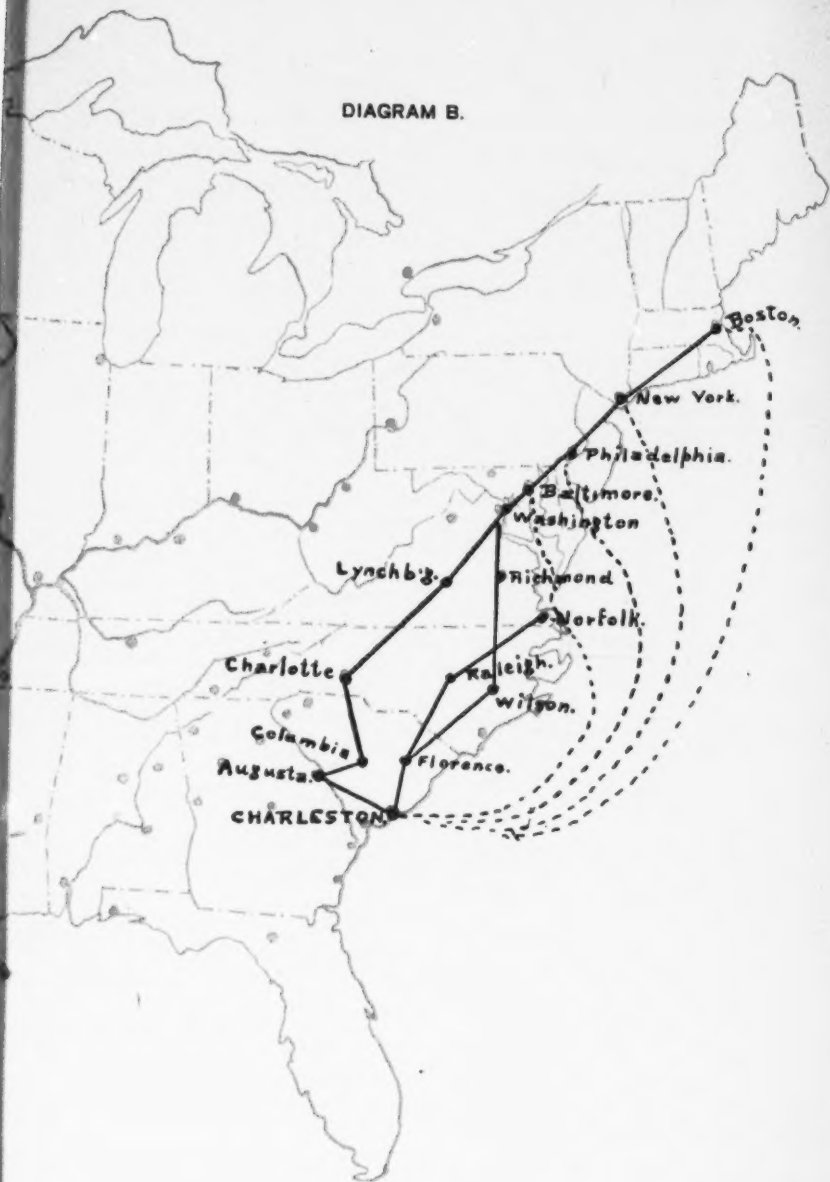


DIAGRAM B.



XI.

TRANSPORTATION LINES FROM THE "EASTERN HAY TERRITORY"
TO CHARLESTON.

Hay can be shipped from Boston, New York, Philadelphia or Baltimore *via* steamship or sailing vessels to Charleston, or it may be shipped all rail.

The opposite diagram (B) shows some of said transportation lines:

XII.

TRANSPORTATION LINES FROM THE "CHICAGO HAY TERRITORY" TO CHARLESTON.

Hay can be shipped from Chicago by lake to Buffalo; thence by the Erie canal to Albany; thence by the Hudson River to New York; thence by ocean to Charleston.

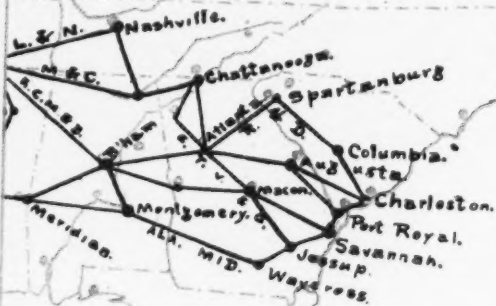
It can also be shipped from Chicago to Erie, Pa., by lake; thence *via* Pennsylvania R. R. to Boston, New York, Philadelphia and Baltimore; thence *via* rail, or *via* ocean to Charleston.

It can also be shipped all rail *via* Cincinnati, Louisville, Evansville and Cairo.

The following diagram (C) shows some of said transportation lines:

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

DIAGRAM D.



XIII.

TRANSPORTATION LINES FROM THE "MEMPHIS HAY TERRITORY" TO CHARLESTON.

Hay can be shipped from Memphis to Charleston, all rail, by the following initial lines and their connections, viz.:

The Memphis & Charleston R. R. and its connections;

The Kansas City, Memphis & Birmingham R. R. and its connections;

The Louisville & Nashville R. R. and its connections;

The Illinois Central R. R. and its connections.

Said lines not only offer to compete, but they actually compete, and actually carry the traffic.

Trans., p. 55.

The opposite diagram (D) shows said initial lines and some of their connections:

XIV.

RATES ON HAY FROM THE "EASTERN HAY TERRITORY" TO CHARLESTON.

In the "Official" classification hay is sixth class; and in the "Southern Railway and Steamship Association" classification it is Class D.

Trans., pp. 73, 74.

From Boston to Charleston the regular tariff rate of the Clyde Steamship Co. on Class D (hay), is 20 cents per 100 lbs.

Trans., pp. 66, 83.

From New York and Philadelphia to Charleston the regular tariff rate of the Clyde Steamship Co. on hay, is 14 cents per 100 lbs.

Trans., pp. 66, 83.

Schooner rates on hay can be obtained from New York and Philadelphia to Charleston, much below the Clyde tariff rates.

Trans., p. 68.

In fact, a rate of 8 cents per 100 lbs. can be obtained on hay, from New York to Charleston.

Trans., p. 76.

From Baltimore to Charleston a rail and water rate of 17 cents per 100 lbs. on hay can be obtained *via* the Virginia ports, Norfolk, etc.

Trans., p. 67.

And a schooner rate of 4 cents per 100 lbs. from Baltimore to Charleston can be obtained on grain or hay.

Trans., p. 58.

XV.

RATES ON HAY FROM THE "CHICAGO HAY TERRITORY" TO
CHARLESTON.

From Chicago, *via* Ohio River points, to Charleston, an all-rail rate on Class D (hay), of 33 cents per 100 lbs. can be obtained.

Trans., p. 58.

From Chicago, *via* Baltimore, to Charleston, a rail and schooner rate of 26 cents per 100 lbs. can be obtained.

Trans., p. 58.

From Chicago, *via* New York, to Charleston, a lake, canal and ocean rate of 22 cents per 100 lbs. can be obtained.

Trans., p. 84:

From Chicago, *via* Baltimore, to Charleston, a lake, rail and schooner rate of 16 cents per 100 lbs. can be obtained.

Trans., p. 58.

The route last mentioned is by lake from Chicago to Erie, Pa., *via* the Erie & Western Trans. Co.; by rail from Erie to Baltimore over the Pennsylvania R. R.; and by schooner from Baltimore to Charleston.

The lake and rail rate from Chicago to Baltimore is 12 cents per 100 lbs.

Trans., 58, 103.

The schooner rate from Baltimore to Charleston is 4 cents per 100 lbs.; thus making a total rate from Chicago to Charleston by lake, rail and schooner of 16 cents per 100 lbs.

Trans., p. 58.

XVI.

RATES ON HAY FROM THE "MEMPHIS HAY TERRITORY" TO
CHARLESTON.

From Memphis to Charleston the all-rail rate on hay is 19 cents per 100 lbs.

Trans., pp. 53, 66.

The rate from Memphis to Charleston was reduced from 23 cents, to 19 cents, in 1891, on account of the movement by rail and water lines; and if this rate were restored to 23 cents, the traffic would go back to the water lines.

Trans., 78, 72, 77.

Grain and hay come from Chicago mostly by lake and rail.

Trans., p. 70.

The fact as to whether grain and hay come to Charleston from Chicago, depends upon the price of hay at Chicago, and other points.

Trans., p. 70.

Large shipments of grain have been made from Chicago to Charleston, *via* the lakes, canal and the ocean.

Trans., pp. 62, 68, 77, 85.

The effect of that traffic is to reduce the business of the rail lines, which run from Memphis, and other Mississippi and Ohio River points to Charleston.

Trans., p. 68.

Water competition (from Chicago, New York, etc.) regulates the rail rates to Charleston from Memphis and the West.

Trans., p. 85, 71, 72.

When the lakes are open, the business *via* the all-rail lines (from Memphis and the West) is materially affected.

Trans., p. 58.

The rate from New York to Charleston, *via* the Clyde Steamship Line, is \$1.60 per ton; while the rate from Memphis to Charleston *via* appellees' lines is \$3.80 per ton.

Trans., p. 59.

The price of hay in New York on a given day is \$15 per ton, as against \$12.70 per ton in Memphis.

Trans., p. 59.

Hay purchased in New York, with freight added, will cost, delivered in Charleston, \$16.60 per ton; while hay purchased in Memphis, on the same day, with freight added, will cost, delivered in Charleston, \$16.50 per ton.

Trans., p. 59, 77.

If the rate of 19 cents from Memphis to Charleston were raised to 25 cents, hay would stop coming from Memphis; and Charleston merchants would purchase all their hay in the East.

Trans., p. 77.

Or the hay would be brought to Charleston by lake, canal, and ocean from Chicago, rather than by rail from Memphis.

Trans., p. 86.

XVII.

THE RATE ON HAY FROM CHARLESTON TO SUMMERVILLE.

The rate on hay from Charleston to Summerville is 9 cents per 100 lbs.

Trans., pp. 53, 66.

It is the local rate of the South Carolina Ry., as allowed by the Railroad Commission of that State, for a distance of 21 miles.

Trans., pp. 61, 66.

There is no proof that said rate is unreasonable or unjust.

XVIII.

THE RATE ON HAY FROM MEMPHIS TO SUMMERVILLE.

The rate from Memphis to Summerville is 28 cents per 100 lbs.; it is what is known as a combination rate; and it is based on Charleston.

The appellees have made a joint through rate on hay from Memphis to Charleston of 19 cents per 100 lbs., Trans., p. 53; and they have also made a joint through rate from Memphis to Augusta of 22 cents per 100 lbs.

Trans., p. 55.

But they have never made a joint through rate on hay from Memphis to Summerville.

Trans., p. 53.

Summerville being a non-competitive, local station, on the South Carolina Ry., situated 116 miles east of Augusta and 22 miles west of Charleston, the rate from Memphis to Summerville must necessarily be a combination rate; and it must be based either on the joint through rate from Memphis to Augusta, or on the joint through rate from Memphis to Charleston.

The joint through rate from Memphis to Augusta, as stated above, is 22 cents per 100 lbs.

Trans., p. 55.

The local rate from Augusta to Summerville is 15 cents per 100 lbs.

Trans., p. 54.

It follows that if the combination rate from Memphis to Summerville were based on Augusta, it would be the sum of 22 and 15—or 37 cents.

Trans., p. 55.

The joint through rate from Memphis to Charleston, as stated above, is 19 cents per 100 lbs.

Trans., p. 53.

The local rate from Charleston to Summerville is 9 cents per 100 lbs.

Trans., p. 61.

By basing the rate from Memphis to Summerville, on Charleston, a combination rate is obtained from Memphis to Summerville of only 28 cents; whereas, if it had been based on Augusta, the combination rate would have been 37 cents; or 9 cents higher than the rate which is now charged.

Trans., pp. 54, 55.

XIX.

The rate from Memphis to Summerville is 28 cents per 100 lbs.

The distance from Memphis to Summerville is 750 miles.

Taking the scale of rates adopted by the Georgia Railroad Commission, as reasonable rates, and extending said scale to 750 miles, it would give a rate of 31 cents per 100 lbs.

Trans., p. 60.

The South Carolina Railroad Commission's scale of rates, if extended to 750 miles, would give a rate of 35 or 36 cents.

Trans., p. 60.

The rate charged by the appellees from Memphis to Summerville is, therefore, less than it would be if the scale of reasonable rates of either the Georgia or South Carolina Railroad Commission were adopted as a standard of comparison.

Again, the rate per ton, per mile, from Memphis to Summerville is .....	.0075
Trans., p. 91.	
The rate, per ton, per mile, from Memphis to Charleston is .....	.0049
Trans., p. 91.	
Difference.....	.0026

It will be seen, therefore, that the rate per ton, per mile, from Memphis to Summerville is only 2 $\frac{1}{2}$ mills higher than the rate per ton, per mile, from Memphis to Charleston.

XX.

THE PROPORTION RECEIVED BY THE SOUTH CAROLINA RAILWAY
OUT OF THE RATE FROM MEMPHIS TO CHARLESTON.

The South Carolina Ry. receives $3\frac{1}{2}$ cents per 100 lbs. out of the rate of 19 cents per 100 lbs. from Memphis to Charleston.

Trans., p. 67.

The length of the haul by the South Carolina Railway from Augusta to Charleston being 138 miles, $3\frac{1}{2}$ cents for 100 lbs. would be equal to $4\frac{1}{2}$ mills per ton, per mile.

Trans., p. 73.

This rate of $4\frac{1}{2}$ mills per ton, per mile, though very low, is more than the additional cost per ton, per mile, of hauling the hay from Augusta to Charleston.

Trans., p. 73.

The additional cost per ton per mile, of hauling two carloads of hay from Augusta to Charleston is very small, because of the fact that while the locomotives of the South Carolina Ry. can haul from 33 to 35 cars from Augusta to Charleston (Trans., p. 73), the average number of freight cars in a train on that road is only 28 (Trans., p. 107); and of that number, there is an average of only 16 loaded cars in each train (Trans., p. 107). The result is that from five to eight additional cars to the train can be hauled from Augusta to Charleston, for very much less than the average cost per ton, per mile, of hauling all classes of freight over the road.

Trans., p. 73.

XXI.

The estimated average cost per ton, per mile, of hauling all classes of freight over the South Carolina Ry. is $7\frac{1}{2}$ mills.

Trans., p. 73.

As shown in Section XX., the South Carolina Ry. is forced by competition to accept $4\frac{1}{2}\%$ mills per ton, per mile, on hay shipped from Memphis to Charleston.

Now, $4\frac{1}{2}\%$ mills is $2\frac{7}{8}\%$ mills less than the estimated average cost per ton, per mile, (viz., $7\frac{3}{8}\%$ mills) of hauling all classes of freight over that road; and if the South Carolina Ry. were compelled to carry all its freight at $4\frac{1}{2}\%$ mills per ton, per mile it would entail a loss of $2\frac{7}{8}\%$ mills on every ton carried one mile.

For the year ended June 30, 1892, the number of tons carried one mile over that road was 74,311,037.

Trans., p. 106.

And a loss of $2\frac{7}{8}\%$ mills per ton, per mile, would represent a total loss on the freight traffic of \$206,584.68.

For the year ended June 30, 1892, there was an actual deficit of \$58,479.55, in the operation of the South Carolina Railway.

Trans., p. 106.

That deficit would have been increased to \$265,064.23, if the South Carolina Railway had been compelled to carry all its freight at the same rate per ton, per mile, that it was forced by competition to accept on hay carried from Memphis to Charleston.

If that railway were forced to reduce its local rates to the proportion which it receives out of through rates, it would be practically ruined.

Trans., p. 72.

XXII.

THE TWO COMPETING RAIL LINES FROM AUGUSTA TO
CHARLESTON.

There are two competing rail lines from Augusta to Charleston.

Line No. 1 is the South Carolina Ry.; and the distance by that line is 138 miles.

Trans., p. 61.

Line No. 2 is the Port Royal and Augusta Ry. in connection with the Charleston & Savannah Ry.; and the distance by that line is 148 miles.

Trans., p. 61.

The difference in distance between the two lines is only 10 miles.

Trans., p. 61.

Line No. 2 competes with Line No. 1 (Trans., p. 61), and Line No. 2 will accept business coming from Memphis, and carry it from Augusta to Charleston, at the same proportion of the through rate (19 cents), as is accepted by Line No. 1.

Trans., p. 61.

The Appellants, whose railroads are west of Augusta, could have delivered Appellee's hay to Line No. 2, at Augusta. It would have been carried by that line to Charleston; and the through rate from Memphis to Charleston by that line would have been the same as by Line No. 1, *i. e.*, 19 cents. Appellee would then have been compelled to pay 9 cents per 100 lbs. to the South Carolina Ry. to have the hay carried from Charleston to Summerville. The combination rate from Memphis, *via Charleston* to Summerville, would have been the same as the rate that was charged in this case, *i. e.*, 28 cents.

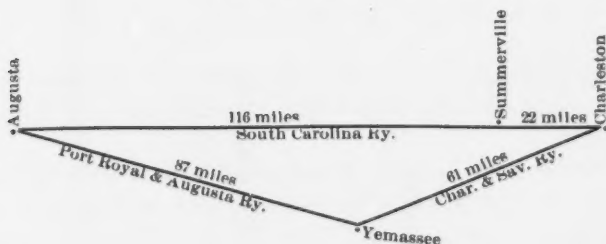
Trans., pp. 61, 62.

If the hay had been sent by Line No. 2, *via Charleston*, to Summerville, there would not have been a less charge for a longer than for a shorter distance. The Fourth Section of the Act would not have been involved; and no complaint would have been made that the combination rate of 28 cents per 100 lbs. from Memphis to Summerville was unjust or unreasonable.

The Appellant has paid no more than he would have paid if the hay had been sent by Line No. 2. In fact, he has saved ten miles in distance; he has avoided a transfer at Charleston; and he has received his shipment in less time, and in better condition, than if it had been sent by Line No. 2.

The following diagram (E) sufficiently illustrates the two competing lines from Augusta to Charleston:

DIAGRAM E.



Augusta to Charleston via South Carolina Railway.....	138 Miles
Augusta to Charleston via Port Royal and Augusta Railway and Charleston and Savannah Railway	148 Miles

XXIII.

CONTRAST BETWEEN NORTHERN AND SOUTHERN RAILROADS IN REFERENCE TO CHARGING LESS FOR A LONGER THAN FOR A SHORTER DISTANCE.

Appellee proved in the Circuit Court that railroads in what is known as "Central Territory," and in what is known as "Trunk Line Territory," do not "*usually*" or "*generally*" charge less for a longer than for a shorter distance.

Trans., p. 88.

The "Central Territory" and the "Trunk Line Territory," together, cover the territory between Chicago and New York.

Trans., p. 87.

The Interstate Commerce Commission, for statistical purposes, has divided the United States into ten territorial groups.

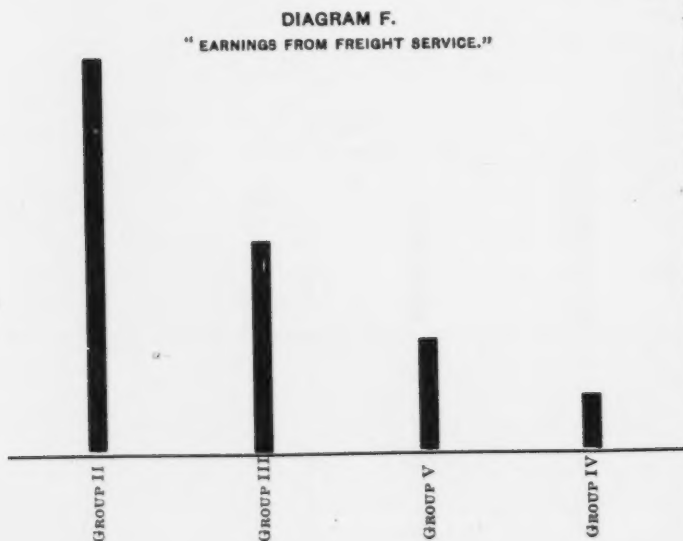
The territory between Chicago and New York comprises groups III and II; and the territory between Memphis and Charleston comprises groups V and IV, as designated by the Commission.

Statistics of Railways (1894), Frontispiece.

The statistician to the Commission has published a number of diagrams to illustrate certain comparisons between the railroads in the various groups.

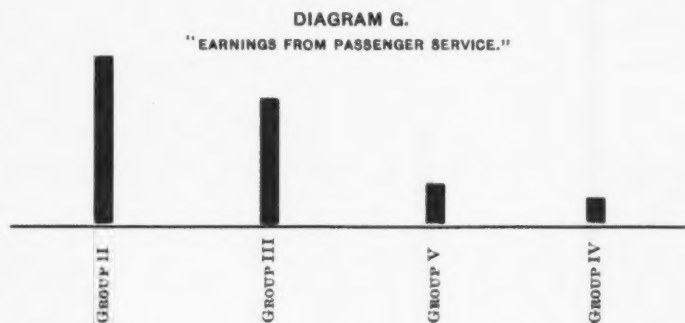
The following diagram (F) illustrates the difference between the railroads in groups II, III, IV and V in their "earnings from freight service" during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 4.



The following diagram (G) illustrates the difference between said railroads in their "earnings from passenger service" during the year 1894.

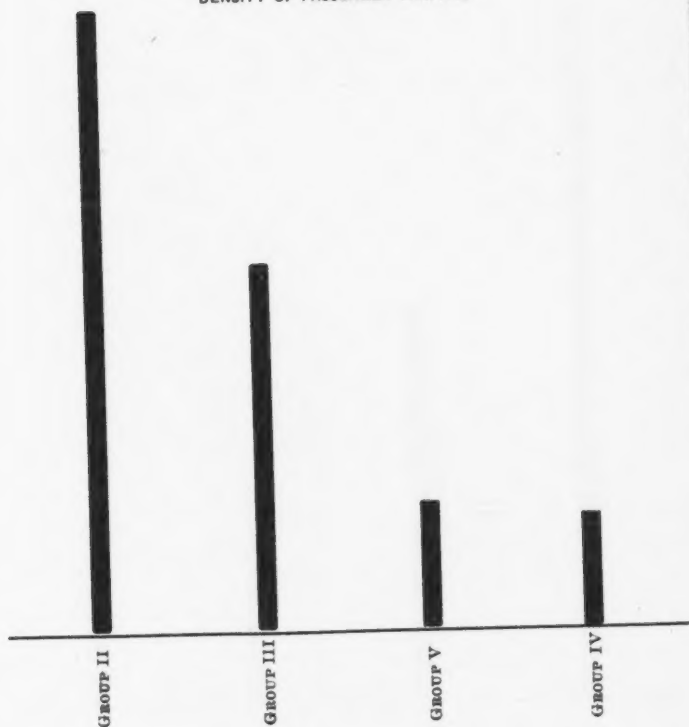
Statistics of Railways (1894). Appendix Diagram No. 4



The following diagram (H) illustrates the difference between said railways in "the density of passenger traffic" during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 6.

DIAGRAM H.
"DENSITY OF PASSENGER TRAFFIC,"

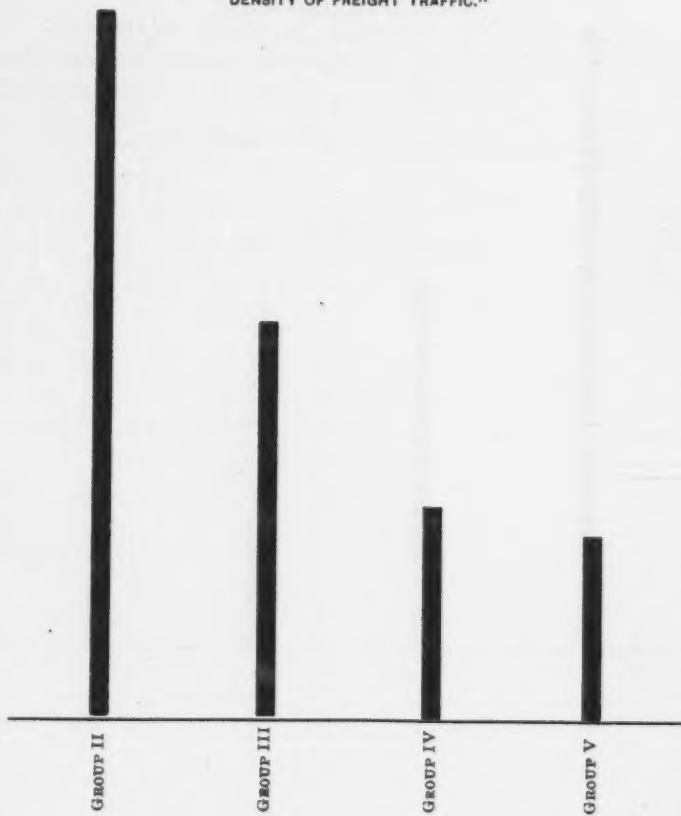


The following diagram (I) illustrates the difference between said railroads in "the density of freight traffic" during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 7.

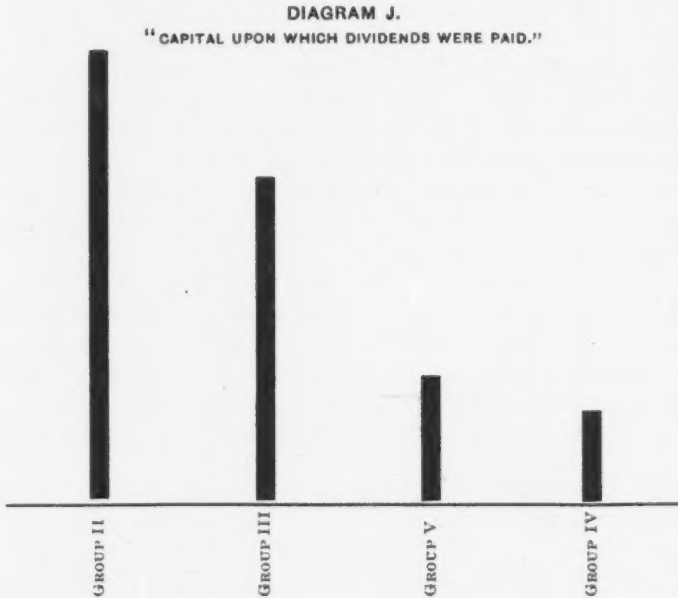
DIAGRAM I.

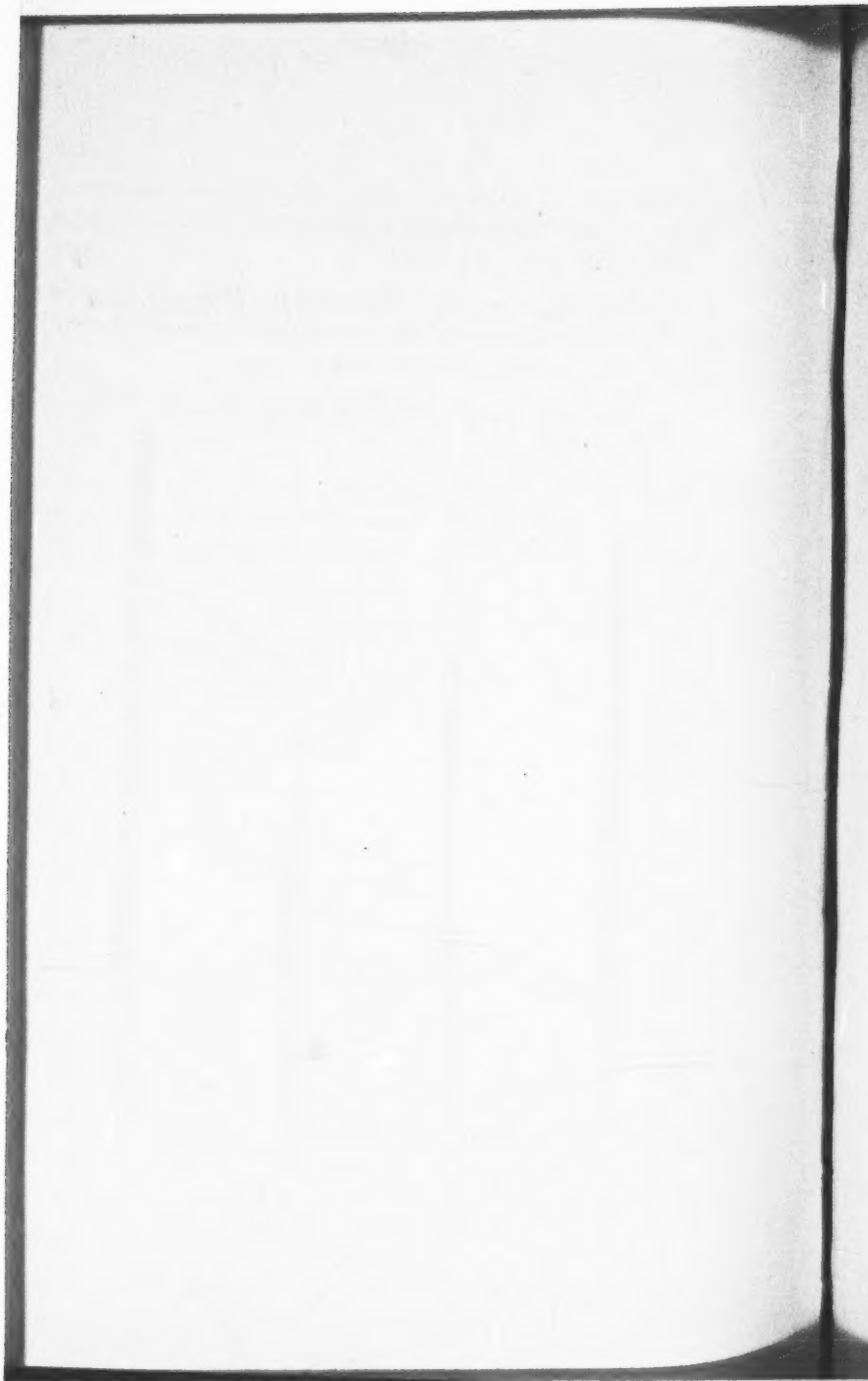
"DENSITY OF FREIGHT TRAFFIC."



The following diagram (J) illustrates the difference between said railroads in the proportion of capital stock upon which dividends were paid during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 2.





PART III.

ARGUMENT.

XXIV.

THE SECTION OF THE ACT TO REGULATE COMMERCE UPON
WHICH THE ORDER MADE BY THE COMMISSION
IN THIS CASE WAS BASED.

The Commission did not base the order made by it in this case either upon the first section, which relates to the reasonableness of rates; nor upon the second section, which relates to unjust discrimination in rates; nor upon the third section, which relates to unjust prejudice in rates. The Commission based said order upon the fourth section alone; it being the section which relates to charging more for a short than for a long haul.

The material part of the order has been heretofore copied in section IV of this argument, and it shows upon its face that said order is based alone upon what is known as the long and short haul clause of the fourth section. Every other issue that might have been decided by the Commission was treated by it as immaterial to the issue which was made upon the fourth section. Upon this point the Commission said:

“If it shall appear in this case that the defendants violate the long and short haul clause of the law by keeping the higher rate to Summerville in force, it will be unnecessary to consider in this report whether the rate to Summerville is in violation of other provisions of the law. In that event the prohibition of the fourth section will afford all the reduction demanded by the complaint.”

Trans., p. 20.

The Circuit Court, also, treated the long and short haul clause of the fourth section as presenting the controlling question in the case.

The Circuit Court, in its opinion, said:

"The controlling question in this case is: Have these defendants violated the provisions of the 4th section of the act of Congress, approved 4th February, 1887?"

Trans., p. 110.

The Court of Appeals, also, treated the fourth section as presenting the real question in the case.

The Court of Appeals, in the majority opinion, said:

"This brings us to the real question in this case, and that is, Have these defendants violated the provisions of the fourth section of the act of Congress, approved February 4, 1887, entitled 'An act to regulate commerce'?"

Trans., pp. 129-130.

Judge Morris, in his dissenting opinion in the Court of Appeals, said:

"The Commission considered only the allegation that the defendants violated the long and short haul clause, and in view of their decision on that point deemed it unnecessary to consider whether any other provision of the law had been violated."

Trans., p. 134.

A mere reading of the report and opinion of the Commission, however carelessly or carefully it may be done, is sufficient to satisfy any one that the Commission intended to base its order in this case upon the long and short haul clause of the fourth section.

It is equally manifest that the majority of the Court of Appeals intended to base the decree of that court upon the long and short haul clause of the fourth section. It was said in the majority opinion: "We do not find it necessary to consider and dispose of the questions raised in the pleadings and argued by counsel, concerning the Southern Railway and Steamship Association, nor the matter of the added local charge of 9 cents from Charleston to Summerville, otherwise than it may be involved in the through rate to Summerville."

Trans., p. 133.

XXV.

THE REASONS STATED BY THE COMMISSION FOR MAKING THE ORDER IN THIS CASE.

The Commission, in its report and opinion, said :

"The defendants claim that substantial dissimilarity in such circumstances and conditions is created by :

1. The competition of various markets for the trade of Charleston ; such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all water lines, or by all rail, or part rail and part water routes.

2. The competition of all rail lines between Memphis and Charleston." * * *

"There is no showing in this proceeding of competition by lines *not subject to the act to regulate commerce* for the carriage of hay from Memphis to Charleston, and the mere fact that there may be competition for such traffic by lines which are *subject to the act*, or that hay may be carried to Charleston by various rail and water, or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the Commission for relief under the proviso clause of that section, but for reasons stated in our decisions of the cases above cited, they do not justify carriers in departing from the rule of the fourth section *without such a relieving order*." * * *

"The competition of markets, or the competition of carrying lines *subject to regulation under the act to regulate commerce* does not justify carriers in making greater short haul or lower long haul charges over the same line *without an order issued by the Commission* on application therefor and after investigation." * * *

"Because Charleston is an important seaport and railroad centre, and hay may be and is carried there from various points, is not sufficient reason for a departure from this rule."

Trans., pp. 21-22.

The reasons as above set forth by the Commission for making its order in this case were approved by the majority opinion of the Court of Appeals.

Trans., pp. 130-131.

XXVI.

THE FACT THAT COMPETING CARRIERS ARE SUBJECT TO THE ACT DOES NOT RENDER IT NECESSARY FOR THEM TO APPLY TO THE COMMISSION FOR RELIEF FROM THE FOURTH SECTION.

The Commission and the Court of Appeals were correct in stating that one of the claims made by defendants was that substantial dissimilarity in circumstances and conditions is created by "the competition of all rail lines between Memphis and Charleston."

In Section XIII of this argument I referred to the testimony which enumerates those lines, and which shows that they not only offer to compete but actually compete, and actually carry the traffic.

The Commission and the majority of the Court of Appeals hold, in effect, that the competition which exists between those lines cannot be considered by them in making rates, without first obtaining the permission of the Commission; and the only reason assigned for such holding is that all of said lines are "subject to the act to regulate commerce."

The majority of the Court of Appeals say:

"And we further hold that competition between carriers subject to the requirements of said Act does not produce such substantial dissimilarity in the circumstances and conditions under which transportation is performed as will justify such carriers in making a greater charge for the shorter than for the longer haul, without an order to that effect from the Commission, granted by it as provided for in the proviso to the fourth section."

Trans., p. 132.

In the case of the Interstate Commerce Commission vs. Alabama Midland Railway Co., this Court say:

"We are unable to suppose that Congress intended by the fourth section, and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do," etc.

168 U. S., p. 169.

Again this Court say:

"That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce, has been held by many of the Circuit Courts."

I. C. C. vs. Ala. Midland Ry. Co., 168 U. S., p. 164.

It will be seen that this Court overruled the doctrine announced by the Commission and the majority of the Court of Appeals in this case to the effect that the competition of carriers subject to the Act to Regulate Commerce, does not create circumstances and conditions which the carriers can take into account in determining for themselves, in the first instance, whether they are justified under the fourth section in charging more for shorter than for longer distances over their lines.

The Commission in its Eleventh Annual Report, in commenting upon the decision of this Court in the Alabama Midland Case, says:

"The defendants (i. e., in the Alabama Midland Case) insisted that the fact of *railway competition* at Montgomery made the circumstances and conditions at Troy and at Montgomery dissimilar, and that, therefore, the inhibition of the fourth section did not apply. The Commission had held in many previous cases, and held in this case (i. e., the Alabama Midland Case), that *railway competition* between carriers *subject to the provisions of the Act* could not of itself create the necessary dissimilarity in circumstances and conditions. This contention is not sustained by the Supreme Court, which holds that such compe-

tition does create that dissimilarity, and that the higher rate to Troy is not prohibited by the fourth section."

The italics are mine.

11 Ann. Rep., I. C. C. (1897), p. 38.

Again, the Commission says :

"That section (i. e., the fourth) enacts that the carrier shall not charge more for the short than for the long haul under substantial similar circumstances and conditions. If the circumstances and conditions are similar, the greater charge cannot be made. If the circumstances and conditions are not similar, the section does not apply. The Court holds (i. e., in the Alabama Midland Case) that *railway competition* of controlling force makes the circumstances dissimilar. If, therefore, we find in a particular case that competition of controlling force actually exists, that ends the matter."

11 Ann. Rep., I. C. C. (1897), p. 43.

Again, the Commission says :

"On November 8, 1897, the Supreme Court held, in the case entitled Interstate Commerce Commission vs. Alabama Midland Ry. Co. et al. (the Troy Case, 168 U. S., ———), that *railroad competition* may create discriminating (dissimilar?) circumstances and conditions under the fourth section and thereby justify greater charges for the shorter haul."

11 Ann. Rep., I. C. C. (1897), p. 91.

In the Case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et. al., decided December 31, 1897, the Commission, in speaking of the defense relied upon in certain instances in that case, says :

"In all other instances, the justification relied upon is the existence of railway competition between carriers subject to the Act to Regulate Commerce. The Commission has uniformly held, up to the present time, that this species of competition does not create the necessary dissimilarity of circumstances and conditions under that section, and such would have been its decision in this case upon the law as it was supposed to be when the findings of fact were prepared. Since then, however,

the Supreme Court of the United States by its decision in the case, *Interstate Commerce Commission vs. Alabama M. R. Co.*, decided November 8th, 1897, 168 U. S., 144, 42 L. Ed. —, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law as applied to the facts found in this case, we are of the opinion that the charging of a higher rate to the intermediate points, as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply and the carrier is not bound to regard it in the making of its tariffs. The Court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point that rate is not made under the same circumstances and conditions as is the rate at the intermediate point and the higher rate is not prohibited by the fourth section."

7 I. C. Rep., pp. 479, 480, Savannah Bureau of Freight
& Transportation vs. Charleston & Savannah Ry.
Co. et. al.

It will be seen that the Commission expressly concedes that the doctrine announced by it in the case at bar, to the effect that the competition of carriers subject to the Act to Regulate Commerce does not create circumstances and conditions which the carriers can take into account, has been overruled by this Court in the Alabama Midland case.

XXVII.

JUDGE SEVERENS' ERROR IN HOLDING THAT THE FOURTH SECTION
MAY APPLY, NOTWITHSTANDING THERE MAY BE A
SUBSTANTIAL DISSIMILARITY OF CONDITIONS.

Counsel for appellee may rely upon the opinion of Judge Severens in the case of *Interstate Commerce Commission vs.*

East Tennessee, Virginia & Georgia Railroad Co. et al. (known as the Chattanooga Board of Trade case), 85 Fed. Rep., p. 107.

In that case Judge Severens, referring to the decision of the Commission in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co. et al., says that the Commission, "evidently disheartened by the adverse rulings of the Supreme Court in recent cases," . . . "seems to give up section 4 as of no force or effect in any case where the conditions are not 'substantially similar.'"

85 Fed. Rep., 117.

The Judge, after referring to the language quoted by me in the last preceding section of this argument from the decision of the Commission in that case, says :

"Now, I do not understand that such a conclusion follows from that decision (i. e., the decision of the Supreme Court in the Alabama Midland Railway case). On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination, whether the conditions are similar, and if dissimilarity is found, *then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of.* In other words, my opinion is that the restraint of *section 4* is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent, *under that section*, to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

I. C. C. vs. E. T. V. & G. Ry. Co., et al., 85 Fed. Rep., p. 118.

I respectfully submit that there is manifest error in Judge Severens' construction of the fourth section. It is a construction which has never been given to that section by any other court; nor by the Commission in any of its decisions. The material part of section 4 is as follows :

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater

compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

In *Re Southern Ry. & S. S. Association* (sometimes cited as *In Re L. & N. R. R. Co.*), 1 I. C. Rep., p. 280, Judge Cooley in speaking of the effect of the introduction into the fourth section of the phrase, "under substantially similar circumstances and conditions," said :

"Here we have clearly stated what is unlawful and forbidden; and for doing the unlawful and forbidden act penalties are then provided. But that which the act does not declare unlawful must remain lawful if it were so before; and that which it fails to forbid, the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, SINCE IF THE CIRCUMSTANCES AND CONDITIONS OF THE TWO HAULS ARE DISSIMILAR THE STATUTE IS NOT VIOLATED."

This language of Judge Cooley was quoted approvingly by Judge Ross, in the case of *I. C. C. vs. A. T. & S. F. R. R. Co.*, 50 Fed. Rep., pp. 300, 301; and see *Behlmer vs. L. & N. R. R. Co.*, 71 Fed. Rep., p. 839; *Brewer & Hanleiter vs. Central of Georgia Railway Co.*, 84 Fed. Rep., p. 261; *I. C. C. vs. Alabama Midland Ry. Co.*, 168 U. S., pp. 168, 169.

Judge Severens is right in saying that the Commission "seems to give up section 4 as of no force or effect in any case *where the conditions are not substantially similar*;" but he is mistaken in supposing that the Commission's yielding of its position was due to the Commission being "disheartened by the adverse ruling of the Supreme Court in recent cases." It will be seen that *In Re Southern Ry. & S. S. Association* referred to above, and which was one of the very first cases decided by the Commission, the Commission speaking through Judge

Cooley gave "up section 4 as of no force or effect in any case *where the conditions are not substantially similar.*"

His language in that case was that "if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated."

The construction of the fourth section suggested for the first time by Judge Severens, would, if sound, require an amendment of the fourth section such as is indicated by capitals in the following paragraph :

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance ; AND EVEN WHERE THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR, SUCH DISSIMILARITY MUST BE IN DUE PROPORTION TO THE EXISTING DISPARITY IN RATES."

His Honor's construction is:

"That the restraint of Section IV. is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates ;" and it is impossible to put that construction upon the fourth section unless, by judicial legislation, the Court adds to the language of that section some such provision as is indicated by capitals in the preceding paragraph.

In the recent case of the United States vs. Trans-Missouri Freight Association, this Court refused to read into the Anti-Trust Act an exception or provision which altered the natural meaning of the language used, and that too upon a material point.

166 U. S., 329.

The construction which Judge Severens proposes to put upon the fourth section is new, but it is not useful ; because, if the disparity in rates between the shorter and longer distance point be such as to constitute an undue preference in favor of the

latter, or an undue prejudice against the former, relief can be given under the third section of the Act. If, however, the disparity does not constitute any undue preference in favor of the longer distance point, nor any undue prejudice against the shorter distance point, it does no harm to any one; and it ought not to be prohibited, as it is proposed to do, by the judicial amendment suggested by Judge Severens.

The Commission, in its Eleventh Annual Report, commenting upon the decision of this Court in the Alabama Midland case, upon the fourth section, says:

"If the circumstances and conditions are similar, the greater charge cannot be made. IF THE CIRCUMSTANCES AND CONDITIONS ARE NOT SIMILAR, THE SECTION DOES NOT APPLY. The Court holds that railway competition of controlling force makes the circumstances dissimilar. IF, THEREFORE, WE FIND, IN A PARTICULAR CASE, THAT COMPETITION OF CONTROLLING FORCE ACTUALLY EXISTS, THAT ENDS THE MATTER. WE HAVE NO POWER TO SAY WHETHER, NOR TO WHAT EXTENT, SUCH COMPETITION JUSTIFIES THE HIGHER RATE TO THE INTERMEDIATE POINT."

"THE THIRD SECTION IS STILL LEFT, AND UNDER THAT SECTION WE MAY INQUIRE WHETHER, UNDER ALL THE CIRCUMSTANCES, THE RATES AS ADJUSTED GIVE AN UNDUE PREFERENCE TO THE COMPETITIVE POINT, but the fourth section is, by this decision, eliminated from the Act."

11 Ann. Rep., I. C. C. (1897), p. 43.

The Commission is wholly mistaken in supposing that the fourth section is eliminated from the Act by the decision of this Court in the Alabama Midland Railway case. If the circumstances and conditions are substantially similar, then, under the fourth section, the carrier is prohibited from charging more for a short than for a long haul, *whether the disparity in rates does or does not give an undue preference to the longer distance point*. If, however, the circumstances and conditions are substantially dissimilar, while the fourth section can have no operation, the third section remains operative, and under that section, the Court can decide whether the disparity in rates constitutes an undue preference in favor of the longer distance point, or an undue prejudice against the shorter distance point.

In the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., the Commission again commenting upon the decision of this Court in the Alabama Midland Ry. case upon the fourth section, says :

“The section declares that the carrier shall not make the higher charge to the nearer point under ‘substantially similar circumstances and conditions.’ IF THE CONDITIONS AND CIRCUMSTANCES ARE NOT SUBSTANTIALLY SIMILAR, THEN THE SECTION (i e., THE FOURTH) DOES NOT APPLY, and the carrier is not bound to regard it in the making of its tariff. The Court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate to the intermediate point, and the higher rate is not prohibited by the *fourth* section.”

“WHETHER THOSE RATES ARE IN VIOLATION OF THE THIRD SECTION, IN THAT THEY GIVE AN UNDUE PREFERENCE TO THE MORE DISTANT POINT, IS A DIFFERENT QUESTION, WHICH MIGHT ARISE IN CASES OF THIS KIND.”

7 I. C. Rep., pp. 479, 480, Savannah Bureau of Freight and Transportation vs. Charleston & Savannah Ry. Co. et al.

In all cases where a greater charge is made for a shorter than for a longer haul, the whole question can, according to Judge Severens, be settled under the fourth section ; and the third section, under his construction, is, in such cases, of no value whatever.

But, according to the construction which the Commission puts upon the decision of this Court in the Alabama Midland Ry. Case, and which construction, *in that respect*, is, I think, the correct one, IF THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR THE FOURTH SECTION DOES NOT APPLY ; BUT THE THIRD SECTION REMAINS, AND, UNDER THAT SECTION, IT MAY BE DETERMINED WHETHER THE DISPARITY IN RATES CONSTITUTES AN UNDUE PREFERENCE OF THE LONGER DISTANCE POINT.

Judge Severens is mistaken in supposing that the Commission is “disheartened by defeat,” or that its comments upon

the decision of this Court are the mere exclamations of a panic-stricken fugitive. On the contrary, the Commission, with a clear conception of what this Court has decided in reference to the fourth section, has fallen back upon the third and first sections of the Act; and the opinion of the Commission in the recent case of *Calloway vs. L. & N. R.R. Co. et al.*, 7 I. C. Rep., p. 431, unmistakably indicates that the Commission intends to use the third and first sections in the future, in all cases of a greater charge for a shorter distance, where the circumstances and conditions are substantially dissimilar; and where, for that reason, the fourth section has no application.

It may be argued by counsel for appellee that Judge Severens' construction of the fourth section finds some support in the following language used by this Court in the *Alabama Midland Railway Case*:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the question of 'undue or unreasonable preference or advantage,' or 'what are substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases; there is no absolute rule which prevents the Commission or the Courts from taking that matter into consideration."

168 U. S., p. 167.

Surely nothing can be found in the language just quoted to sustain Judge Severens in his proposition, that *though the circumstances and conditions may be substantially dissimilar, the "restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates."*

This Court, in saying that "we do not hold that the mere fact of competition, no matter what its character or extent,

necessarily relieves the carrier from the restraints of the third and fourth sections," did not intend to intimate that either section contains any such restraint as that the rates must be "upon the scale of comparison between the dissimilarity of conditions and the disparity of rates." The only restraint contained in the fourth section is that the carrier shall not charge more for a shorter than for a longer haul under substantially similar circumstances and conditions ; and this Court, in saying that the mere fact of competition, no matter what its character or extent, does not necessarily relieve the carrier from the restraint of the fourth section, *means that competition which is fictitious or ineffective, or in which the public has no interest, shall not be taken into consideration at all*, as a circumstance or condition affecting the transportation. If, however, the competition be genuine and effective, and if it subserves the interest of the public, as well as that of the carrier, it may be taken into consideration ; and in such a case, it will relieve the carrier from the restraint of the fourth section, i. e., from charging more for a shorter than for a longer haul. But the restraint of the third section remains ; and if the disparity in rates constitutes an undue preference of the longer distance point, the rates may be declared unlawful under the restraint of that section, notwithstanding they may not offend against the restraint of the fourth section at all.

Judge Severens seems to doubt the soundness of his own construction of the fourth section, and to concede that it may become necessary to fall back upon the third section. His language is :

" But the long and short haul clause is only one of the specific provisions employed for the general purpose of the Act. The third section underlies the fourth and supplies the principles on which it rests ; so that if the literal construction referred to be put upon the fourth section, the case would still be exposed to the third section, which forbids undue preference to one locality or the subjection of another to any undue disadvantage."

85 Fed. Rep., p. 117.

The only error in the language just quoted consists in the proposition that " the third section underlies the fourth and supplies the principles on which it rests."

The third section does *not* underlie the fourth. The third

section covers ground which is entirely distinct from that which is covered by the fourth section.

The *third* section does not prohibit *any* preference *unless it is undue or unreasonable*; while the *fourth* section prohibits a greater charge for the shorter than for the longer distance, if the circumstances and conditions be substantially similar, *whether such disparity of rates does or does not constitute an undue or unreasonable preference of the longer distance point.*

XXVIII.

JUDGE SEVERENS' ERROR IN SUPPOSING THAT THIS COURT HELD
THAT THE RIGOR OF THE FOURTH SECTION
CAN BE MODERATED.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., et. al., referred to above, Judge Severens uses this language :

"Conceding that some allowance should be made for the conditions at Nashville (the longer distance point), the rigor of the rule of the long and short haul clause of the fourth section, moderated to some extent, *as it was held might be done in the case of the Commission vs. The Alabama Midland Railway Company, 168 U. S. 144*, the disproportion in the present case is too gross."

85 Fed. Rep., pp. 112, 113.

The italics are mine.

I respectfully deny that it was held, or even intimated by this Court in the Alabama Midland Railway Case, that "the rigor of the rule of the long and short haul clause of the fourth section" could be "moderated to some extent," or to any extent.

The case was decided upon the ground that the long and short haul clause of the fourth section *did not apply at all*; and not upon the ground that "the rigor" of that clause had been properly or improperly "moderated." If the circumstances and conditions are substantially similar, and a greater charge is made for a shorter than for a longer distance, etc., no court

has the power to "moderate" the rigor of the fourth section to the slightest extent. If, in such a case, the charge to the shorter distance point exceed the charge to the longer distance point, even to the extent of a mill, such charge is absolutely prohibited by the fourth section; and no power is vested in any court to moderate the rigor of the prohibition.

The carrier, upon application to the Commission, may in special cases be relieved from the operation of the fourth section; but as no application has been made to the Commission for relief in the case at bar, it is unnecessary to discuss the question whether the Commission would, upon such an application, have the power to moderate the rigor of the fourth section; or whether it would be limited to granting or refusing full absolution. But whatever power the Commission might have under a special application for relief, it is certain that in a case where no application for relief has been made to the Commission, no Court has the right to moderate, to any extent whatever, the rigor of the long and short haul clause, in any case to which it applies.

XXIX.

JUDGE SEVERENS' ERROR AS TO WHAT WAS HELD BY THE LOWER COURTS IN THE ALABAMA MIDLAND CASE.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., et al., referred to above, Judge Severens, in commenting upon the decision of this Court in the Alabama Midland case, uses this language:

"Both the courts below had concurred in holding that the Commission was wrong in thinking the disparity of charges was too great in view of the facts, and the Supreme Court did not find sufficient reason for reversing their decree." 85 Fed. Rep., p. 114.

The italics are mine.

I respectfully deny that either the Circuit Court, or the Court of Appeals, decided the Alabama Midland Railway Case upon the ground that the Commission was wrong *"in thinking the*

disparity of charges was too great." Neither of those courts intimated that "the restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates."

That "scale of comparison" was invented for the first time by Judge Severens; and neither the Circuit Court, nor the Court of Appeals, attempted to use it in the Alabama Midland Railway Case. Both of those courts decided that case on the ground that the circumstances and conditions were substantially dissimilar, and therefore *that the fourth section did not apply at all*. And neither of them attempted to discuss the question as to whether "the rigor of that section had been properly, or improperly, 'moderated' by the Commission."

See the Opinion of the Circuit Court in the Alabama Midland Ry. Case, 69 Fed. Rep., 227 to 233; and the opinion of the Circuit Court of Appeals in 74 Fed. Rep., 715 to 733.

XXX.

JUDGE SEVERENS' ERROR IN SUPPOSING THAT THIS COURT HELD
THAT COMPETITION IS NOT TO BE REGARDED AS A
CONTROLLING CONSIDERATION.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., referred to above, Judge Severens said :

"The Supreme Court in that case, (i. e., the Alabama Midland Ry. case) while reaffirming the doctrine that competition between railway carriers might, and frequently ought to be, considered in adjusting rates under the long and short haul clause, yet took pains to prevent the inference from its opinion that it (competition) should be regarded as a *controlling consideration*."

85 Fed. Rep., p. 114.

I respectfully deny that this Court "took pains to prevent the inference that competition should be regarded as a *con-*

trolling consideration." On the contrary, I insist that the very point decided by this Court in the Alabama Midland Ry. case was that where competition *is such that it can be properly considered*, it is to be allowed to *control* in the making of rates.

I will hereinafter show that the competition at Charleston, the longer distance point, is "such as, having due regard for the interests of the public and of the carrier, ought justly to have effect upon the rates;" and therefore that it can be properly considered. And I will hereinafter show that if the competition be such as can be properly considered at all, it must, of necessity, be allowed to *control* in fixing rates at competitive points.

There can be no middle course. The Courts must hold either that competition *can* be considered, or that it *cannot* be considered, in fixing competitive rates.

If they hold that it cannot be considered in fixing competitive rates, then the short rail lines, and the water lines will have a monopoly of the transportation business of the country. If, on the other hand, the courts adhere to the doctrine decided by this Court in the Alabama Midland Ry. case, that competition, such as affects rates and such as subserves the interests of the public as well as of the carrier, may be considered in fixing competitive rates, then such competition must, of necessity, *control* in the fixing of those rates. All competing lines, however numerous they may be, must accept the lowest rates offered by any one of them, or all but one of them must abandon the competitive traffic altogether.

XXXI.

JUDGE SEVERENS' ERROR IN HOLDING THAT CONGRESS INTENDED
THAT THERE MUST BE SOMETHING UNUSUAL AND
PECULIAR IN THE COMPETITION.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., referred to above, Judge Severens said :

"As the circumstances vary infinitely and constantly in the course of such business, it would seem that Congress must

have intended something unusual and peculiar, out of the ordinary course, not ordinarily incident to the business, as that which would create a substantial dissimilarity; for otherwise, the vast bulk of transportation would not be subject to the rule at all."

85 Fed. Rep., p. 114.

The inference which counsel for appellee may seek to draw from the language just quoted is, that as competition between railroads which are subject to the Act to Regulate Commerce is "ordinarily incident to the business," and therefore not "unusual," or "peculiar," it cannot create a "substantial dissimilarity" within the purview of the fourth section.

If counsel's construction of his Honor's language is correct, his Honor has fallen into the very error for which the Commission was reversed in the Alabama Midland R'y case.

In the opinion delivered by the Commission in the Alabama Midland R'y case, it was said:

"No attempt is made to establish substantial dissimilarity of circumstances and conditions at Montgomery on the ground of rail competition further than by proof of the fact that there are a number of railway lines running to and through that city connecting with different parts of the country. This alone, it is scarcely necessary to say, is not sufficient. *Re Louisville & Nashville R.R. Co.*, 1 Inters. Com. Rep., 278, 1 I. C. C. Rep., p. 31."

4 Inters. Com. Rep., p. 35, left col. Board of Trade
vs. Alabama Midland R. Co.

It will be noticed that the Commission in deciding the question of rail competition in the Alabama Midland R'y case, based its opinion upon its previous decision in *Re Louisville & Nashville R.R. Co.*

In *Re Louisville & Nashville R.R. Co.* (sometimes cited as *Re Southern Railway & Steamship Association*), 1 Inters. Com. Rep., p. 278, it was held by the Commission that where railroads are subject to the Act to Regulate Commerce, compe-

tition between them could not be considered except in "*rare and peculiar cases*."

1 Inters. Com. Rep., p. 278, right col., 5th head note, par. (c).

In the Alabama Midland Ry. case, there was no pretense that there was anything "rare," or "peculiar," or "unusual" in the competition between the various railroads which centered at Montgomery. It was conceded that all of said railroads were subject to the Act to Regulate Commerce; and the very question which this Court was asked to decide in that case was whether the competition between those rail lines at Montgomery, all of which were confessedly subject to the Act to Regulate Commerce, could properly be taken into consideration in fixing competitive rates to and from Montgomery.

While there was a question of fact in the Alabama Midland Ry. case as to whether there was any water competition at Montgomery, there was no question of law in that case as to whether water competition could be taken into consideration.

The Commission itself, in one of its earliest cases, had decided that water competition, and competition between rail carriers *not* subject to the Act to Regulate Commerce could be taken into consideration. It had also decided that competition, even between rail carriers subject to the Act, could be taken into consideration "*in rare and peculiar cases*."

1 Inters. Com. Rep., p. 278, right col., 5th head note.

In Re Southern R'y & S. S. Association.

None of those questions, therefore, were raised in the Alabama Midland Ry. case. The question raised in that case was whether competition between rail carriers subject to the Act, could be considered, *where there was nothing "rare," "unusual," or "peculiar" in it; and where it was in no wise different from other ordinary rail competition*. I understand this Court to have decided in that case, that if the competition be such as to affect rates, and such as subserves the public interest as well as the interest of competing carriers, it may be taken into consideration, notwithstanding all of the competing rail carriers are subject to the Act to Regulate Commerce, and notwithstanding there be nothing "rare," "unusual," or "peculiar" in the competition.

XXXII.

THE CONTENTION THAT COMPETITION CANNOT BE CONSIDERED
EXCEPT IN EXTREME CASES.

Counsel for appellee may refer to the fact that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul, etc., only existed in cases of competition in transportation to the longer distance point; and he may argue that, as Congress knew this fact, it did not intend that competition in transportation should be an excuse in *all* cases, but only in certain *extreme* cases, where, in the language of this Court, "*the interest of the public as well as of the carrier demand it.*"

I concede that Congress did not intend that competition in transportation should be an excuse "in *all* cases."

I also concede that Congress did not intend that competition should be an excuse in any case, except where "the interests of the public as well as of the carrier demand it."

But I contend that where "the interests of the public as well as of the carrier" *do* demand it, Congress *did* intend that competition should be an excuse.

XXXIII.

JUDGE SEVERENS' ERROR IN CONSTRUING THE ARGUMENT OF
COUNSEL FOR THE CARRIERS AS CONTENDING THAT THE
EXTENT OF THE DISCRIMINATION MUST BE CON-
FIDED TO THE JUDGMENT OF RAIL-
ROAD OFFICIALS.

In the case of I. C. C. vs. E. T., V. & G. Ry. Co., referred to above, Judge Severens said that the argument of counsel for the carriers in that case was, in effect, that "*the extent of the*

discrimination must be confided to the judgment of the railroad officials, whose ability and experience best qualify them for the task," and that "there is nothing for the Commission or the Court to do but to take notice of the fact that the conditions are dissimilar, and abandon all further inquiry."

85 Fed. Rep., p. 117.

His Honor misapprehended my argument in that case. I have never claimed that "the extent of the discrimination" must be confided to the judgment of railroad officials; nor have I ever denied the right of either the Commission, or the Court to review the judgment of railroad officials, on any question.

My argument in that case was, as it is in this case, that where the existence of competition at a longer distance point is such as to create a substantial dissimilarity between the circumstances and conditions which exist at that point, and those which exist at a shorter distance point, neither railroad officials, nor commissions, nor courts, can determine "the extent of the discrimination" by any such "scale of comparison between the dissimilarity of conditions and the disparity of rates" as was suggested by Judge Severens in that case.

My contention was, and is, that "the *extent* of the discrimination" *determines itself*. If the rates to the shorter distance point be reasonable within the purview of the first section, and competition forces lower rates to some longer distance point, there is but one question submitted either to the carrier, the Commission or the Court, and that is whether it will subserve the public interest, as well as the carrier's interest, for the carrier to compete at such longer distance point.

The decision of that question by the carrier may be reviewed either by the Commission, or the Court. But if the Commission or the Court agrees with the carrier that it will subserve the public interest, as well as the interest of the carrier, for the carrier to compete at the longer distance point, then "the extent of the discrimination" *will determine itself*; and it will amount to exactly the difference between the reasonable rates charged to the shorter distance point, and the lower rates forced by competition to be charged at the longer distance point;—whatever that difference may happen to be.

XXXIV.

THE "SCALE OF COMPARISON" SUGGESTED BY JUDGE SEVERENS
CANNOT BE USED IN PRACTICAL RATE-MAKING.

In the Case of I. C. C. vs. E. T., V. & G. Ry. Co. et al., Judge Severens said :

"In other words, my opinion is that the restraint of *section 4* is to be applied upon *the scale of comparison between the dissimilarity of conditions and the disparity of rates*, and that it is competent under *that section* to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

85 Fed. Rep., 118.

It is one thing to state a theoretical proposition, and quite another thing to formulate a practical rule.

In the enforcement of the Act to Regulate Commerce, the courts will necessarily be compelled to formulate certain rules for rate-making, to be followed by the railroad traffic managers of the country. The subject of rate-making is an eminently practical subject; and such rules as the courts may formulate must be such as can be practically applied to the commerce of the country, or they will be useless, if not injurious. With the utmost respect for Judge Severens, I submit that there is no theoretical mathematician who can understand what Judge Severens means by the phrase "*the scale of comparison between the dissimilarity of conditions and the disparity of rates*;" and I also submit that there is no practical railroad traffic manager, who can make out a tariff, or schedule of rates, upon any such "*scale of comparison*," as Judge Severens suggests.

This Court judicially knows that the railroad rates in Georgia are fixed by a Commission of that State; and therefore it is fair to presume that they are reasonably low.

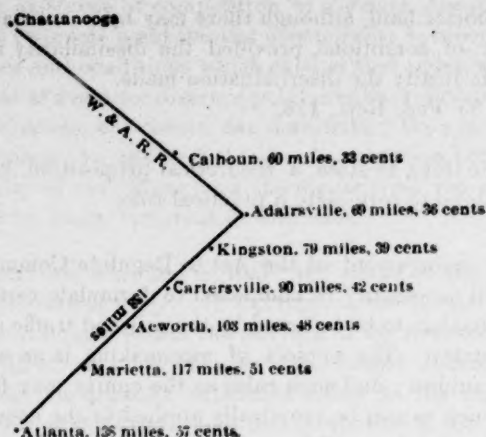
The Standard Freight Tariff as fixed by the Commission of

that State is printed on pp. 104-105 of the Transcript. It will be seen by reference to said tariff that the rates increase as the distance increases.

For the purposes of illustration I will take the case of the Western & Atlantic Railroad, which extends from Chattanooga to Atlanta, and I will assume that its rates are made in accordance with the Standard Freight Tariff prescribed by the Georgia Railroad Commission.

The following diagram has been drawn to a scale showing the distance from Chattanooga to each of certain stations on that road; and the rate on first-class freight, in cents per one hundred pounds, from Chattanooga to each of said stations as fixed by said tariff:

DIAGRAM NO. 1.



As counsel for the appellee contends that distance should be a controlling factor in the construction of rates, and as the local rates of the Western & Atlantic R.R. are constructed upon the basis of distance, it would seem that they ought to meet with his approval.

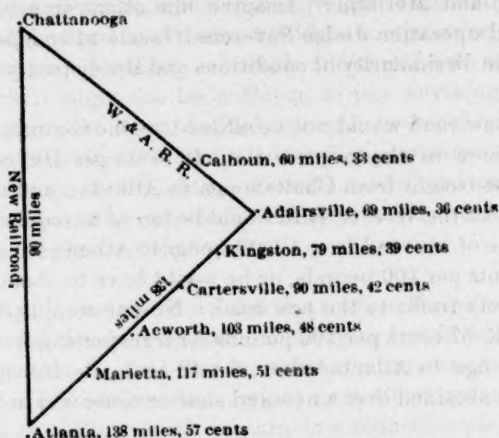
It will be seen from said diagram that the distance from Chattanooga to Atlanta via the Western & Atlantic R.R., is 138 miles; and for that distance the Western & Atlantic R. R. is allowed to charge 57 cents per 100 pounds on first-class freight.

It will also be seen that the distance from Chattanooga to Cartersville is 90 miles ; and for that distance the Western & Atlantic R.R. is allowed to charge 42 cents per 100 pounds on first-class freight.

For many years the Western & Atlantic R.R. was the only rail line from Chattanooga to Atlanta. And as the rates from Chattanooga to all of said local stations were constructed upon a mileage basis, and as there was no instance where a greater charge was made for a shorter than for a longer distance, on traffic originating at Chattanooga, people living along the line of the Western & Atlantic R.R. were doubtless entirely satisfied with the rate adjustment on that traffic.

Suppose a new railroad were constructed from Chattanooga to Atlanta, over a line that is only 90 miles long, as shown in the following diagram :

DIAGRAM No. 2.



Suppose that the local rates of the new road were fixed by the Georgia Railroad Commission, and fixed on the same basis as that upon which the local rates of the W. & A. R.R. are fixed.

As the distance from Chattanooga to Atlanta by the new road would be only 90 miles, the new road would be limited to

a maximum rate of 42 cents per 100 pounds from Chattanooga to Atlanta. In other words, the effect of the construction of the new road would be, for all practical purposes, to reduce the distance from Chattanooga to Atlanta from 138 miles to 90 miles, and to entitle Atlanta, upon a distance basis, to the same rates from Chattanooga, via the new road, as Cartersville is entitled to via the W. & A. R.R.

Cartersville would have no right to complain ; because, though she would be nearer than Atlanta, to Chattanooga, measured by the W. & A. R.R., Atlanta, measured by the new line, would be as near as Cartersville, to Chattanooga.

Acworth and Marietta would have no right to complain ; because, measured by the new road, Atlanta would be nearer than they, to Chattanooga.

The practical question arises, how ought the traffic manager of the W. & A. R.R. to readjust his rates from Chattanooga to Acworth and Marietta ? Imagine him attempting to put into practical operation Judge Severens' " scale of comparison between the dissimilarity of conditions and the disparity of rates."

The new road would not be allowed by the Georgia Railroad Commission to charge more than 42 cents per 100 pounds on first-class freight from Chattanooga to Atlanta ; and the traffic manager of the W. & A. R.R. would be forced to reduce the first-class rate of his road from Chattanooga to Atlanta from 57 cents to 42 cents per 100 pounds, or he would have to abandon all of the Atlanta traffic to the new road. No one would pay the W. & A. R.R. 57 cents per 100 pounds for transporting freight from Chattanooga to Atlanta, when, for 42 cents, its transportation could be obtained over a new and shorter route and in less time.

If the traffic manager of the W. & A. R.R. should conclude to abandon the Atlanta traffic the result would be that Atlanta and Chattanooga would be deprived of the competitive services of the W. & A. R.R.; and the W. & A. R.R., which had for many years performed all of the service between Chattanooga and Atlanta, would be prevented from performing any of it in the future. It would lose all the revenue which it had formerly realized from that traffic. The loss of revenue thus occasioned

would have to be made up by increasing the rates to and from the local stations on the W. & A. R.R. between Chattanooga and Atlanta, provided the Georgia Railroad Commission would permit those rates to be increased. And if said Commission should refuse to allow those rates to be increased, the W. & A. R.R., or its stockholders and creditors, would have to sustain the entire loss of revenue ; except in so far, as by reducing the number of trains, and otherwise cheapening its transportation service, the W. & A. R.R. could economize in its expenditures.

If we suppose that the traffic manager of the W. & A. R.R. had ascertained that he could earn sufficient revenue, at the reduced rate from Chattanooga to Atlanta, to pay something more than the additional cost of movement, of the Atlanta traffic, he would naturally have determined to continue to carry freight from Chattanooga to Atlanta. It would still have been necessary for his trains to run from Chattanooga in the direction of Atlanta, in order to carry freight from Chattanooga to the local stations on the W. & A. R.R.; and the additional cost of carrying, in the same trains, a few cars of freight loaded at Chattanooga, and destined to Atlanta, would be comparatively small. If he could earn anything over such additional cost of movement, while it might not be sufficient to pay anything toward dividends, or even toward fixed charges, it would still be a profit *over what it would cost to move that particular freight*; and however small it might be, it would contribute something toward the operating expenses. At all events, it would not be any burden upon the other traffic.

We will suppose, therefore, that the traffic manager of the W. & A. R.R. did conclude to continue carrying freight from Chattanooga to Atlanta; and that he was forced to accept 42 cents per 100 pounds on first-class freight from Chattanooga to Atlanta. Such action would amount to a reduction of 15 cents per 100 pounds on that class of freight, from Chattanooga to Atlanta. Does Judge Severens mean that the rates from Chattanooga to Acworth and Marietta should be reduced *in the same proportion* as the rates from Chattanooga to Atlanta were reduced ; or does he mean that the rates from Chattanooga to Acworth and Marietta should be reduced without regard to proportion, until they might be no higher than the rates from Chattanooga to Atlanta ? If he does not mean either of these

things, what does he mean? The traffic manager of the Western & Atlantic R.R., in order to obey the decree of the Court, must have some *practical* rule upon which to reconstruct his schedule.

If it be said that the rates from Chattanooga to Acworth and Marietta should be reduced in the same proportion as the rates from Chattanooga to Atlanta are reduced, such reduction would not accord with the "scale of comparison between the dissimilarity of conditions and the disparity of rates." There would be no competitive circumstances or conditions whatever at Acworth or Marietta; while the competitive circumstances and conditions at Atlanta (caused by the construction of the new road) would be the sole cause of the reduction in rates from Chattanooga to that point.

If it be said that the rates from Chattanooga to Acworth and Marietta should be reduced, without regard to proportion, until they be no higher than the rates from Chattanooga to Atlanta by the new road, such a reduction would give to Acworth and Marietta an undue preference over Atlanta, provided distance be the controlling factor in rate construction; because, while, by the new road, the distance from Chattanooga to Atlanta would be only 90 miles, the distance from Chattanooga by the Western & Atlantic R. R. to Acworth is 103 miles, and to Marietta 117 miles.

If it be said that, though it might not be necessary to reduce the Acworth and Marietta rates in the same proportion as the Atlanta rates were reduced, and though it might not be necessary to make the Acworth and Marietta rates as low as the Atlanta rates, still there ought to be "some" reduction in the Acworth and Marietta rates, the practical question remains, *how much reduction shall be made?*

As the new road would not touch either Acworth or Marietta, its construction would not affect the circumstances and conditions existing at either of those points, and, therefore, I do not see why either of them should be entitled to any reduction in rates, merely because there had been a change of circumstances and conditions at Atlanta. But conceding, for the sake of argument only, that Acworth and Marietta would be entitled

to "*some*" reduction, the question remains as to what practical rule or principle should govern the traffic manager of the W. & A. R. R. in making up his schedule or tariff to put the reduction into effect? Again, this is but asking, in another form, what does Judge Severens mean by the phrase, the "scale of comparison between the dissimilarity of conditions and the disparity of rates"?

I repeat that there is no theoretical mathematician, or practical traffic manager, who can take the diagram referred to above, and mark opposite each of the local stations on the W. & A. R.R. between Cartersville and Atlanta the rate that ought to be fixed from Chattanooga to that station, so that the rates will comply with Judge Severens' "*scale of comparison between the dissimilarity of conditions and the disparity of rates.*" If the roads represented in said diagram were interstate roads, the Interstate Commerce Commission, prior to the Alabama Midland Ry. decision, would have reduced all of the rates from Chattanooga to the local stations between Cartersville and Atlanta down to the level of the Atlanta rate. In that case, there would have been no "*disparity of rates,*" and consequently no use for a "*scale of comparison between the dissimilarity of conditions and the disparity of rates.*" But since the decision in the Alabama Midland Ry. case, the competition at Atlanta would be recognized as constituting a substantial "*dissimilarity of conditions;*" and a "*disparity of rates*" would exist, to the extent of the difference between the new rate from Chattanooga to Atlanta, and the old rates from Chattanooga to the respective local stations on the W. & A. R.R. between Cartersville and Atlanta; and if Judge Severens' "*scale of comparison*" is of any value, it ought to enable us to determine the precise amount of reduction that ought to be made in the rate to each of those stations.

My contention is, that instead of attempting to use the theoretical and impracticable "*scale of comparison*" invented by Judge Severens, the Commission and the Court should determine from the testimony, First: Whether it would subserve the interest of the public as well as of the W. & A. R.R. Co., for the latter to compete at Atlanta, at the reduced rates offered by the new road; and Second: Whether the rates charged to Acworth and Marietta would have been regarded as just and reasonable if the new road had not been con-

structed; and if these two facts be decided in the affirmative, "the extent of the discrimination" *will determine itself*, and will amount exactly to whatever the difference may happen to be between the reasonable rates charged to Acworth and Marietta, the shorter distance points, and the lower rates forced by the competition of the new road at Atlanta, the longer distance point.

XXXV.

THE LIMITATIONS WHICH MAY REASONABLY BE IMPOSED UPON
CARRIERS IN THE EXERCISE OF THEIR RIGHT TO TAKE
INTO CONSIDERATION COMPETITION AS ONE
OF THE CIRCUMSTANCES AND
CONDITIONS AFFECTING
TRANSPORTATION.

My contention concedes that carriers, in exercising the privilege of taking into consideration competition as one of the circumstances and conditions affecting transportation, must act within "reasonable limits."

In the case at bar I concede that the "reasonable limits" imposed upon the exercise of said privilege are three; each of which is eminently practical, and capable of judicial determination.

First: The rates charged by the appellants to Summerville, the shorter distance point, must not be unjust or unreasonable, within the purview of the first section of the Act, i. e., they must be such as would have been regarded as just and reasonable if lower rates were not charged to Charleston, the longer distance point.

Second: The competition at Charleston, the longer distance point, must be such as subserves the public interest. It must also be real; and such as to compel the acceptance by the appellants of the rates that are accepted by them at that point.

Third: The rates accepted by the appellants on traffic to

Charleston, the longer distance point, must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

Within the above limits, any rates which may be accepted by the appellants, upon traffic to Charleston, the longer distance point, are lawful.

The first limitation suggested by me concedes that the rates charged by the appellants to Summerville, the shorter distance point, must not be unjust or unreasonable; i. e., that they must be such rates as would be regarded as perfectly fair were it not for the fact that the appellants are charging less rates to Charleston, the longer distance point.

If the rates charged by the appellants to Summerville, the shorter distance point, are not just and reasonable they violate the first section of the Act; they must be condemned under that section; and there is no need to invoke the operation of either of the subsequent sections of the Act.

But if the rates charged by the appellants to Summerville, are just and reasonable (a question which I will consider hereafter under the first section of the Act), we have the case of a complaint made on behalf of certain persons at Summerville who are charged rates which are perfectly just and reasonable; and whose only real objection is that the appellants are charging less rates to Charleston, a longer distance point.

As said by Lord Curriehill, in *Hozier vs. the Caledonian Ry. Co.*, their complaint "may be likened to that of the laborer, who, having worked all day, complained that others, who had worked much less, received a penny like himself."

1 Nev. & Mac., p. 32, Note 4; 1 Nev. & Mac., pp. 45-47, *Jones vs. E. C. Ry. Co.*; 2 Nev. & Mac., p. 202, *Foreman et al. vs. Great Eastern Ry. Co.*; 1 Nev. & Mac., pp. 97-108, *Harris vs. Cockermouth, etc., Ry.*; 1 Nev. & Mac., p. 120, *Ransome vs. E. C. Ry. Co.*

The *Hozier* case was cited by this Court in 145 U. S., p. 282, and in 162 U. S., p. 222.

The Jones case was cited by this Court in 145 U. S., p. 283.

The Foreman case was cited by this Court in 162 U. S., p. 222.

And the Harris case was cited by this Court in 162 U. S., pp. 223, 224.

If the rates to Summerville are just and reasonable (a question which I will hereafter consider under the first section), the appellants ought not to be required to reduce them, even though such reduction may be necessary to place Summerville upon a "rate equality" with Charleston; because such a reduction in rates to Summerville involves the same reduction in rates to all of the other local stations of the South Carolina and Georgia R. R., which would result in a serious reduction in the revenue which that railroad derives from the present rates to those stations.

The second limitation suggested by me concedes that the competition at Charleston, the longer distance point, must be such as subserves the public interests; that it must be real and not feigned or fraudulent; and that it must be effective, i. e., such as to compel the acceptance of the rates that are charged by the appellants to that point.

The third limitation suggested by me concedes that the rates accepted by the appellants on traffic to Charleston must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

If the competition at Charleston be real, and such as to affect rates, the appellants must accept those rates or abandon the competitive traffic.

If the rates to Charleston be so low as not to pay the additional cost of the movement of the Charleston traffic, the appellants ought not to be allowed to compete for it. It would not be to their interest to carry that traffic at a loss; and it would not be to the interest of the public for them to do so; because it would tempt the appellants to try to increase their local rates, in order to reimburse them for the loss sustained in carrying the Charleston traffic.

But if the competition at Charleston be real, and such as to affect rates; and if those rates pay something more than the additional cost of the movement of that traffic, it is to the interest of the appellants as well as to the interest of the public, that the appellants should be allowed to compete for the traffic. Whatever profit there may be in that traffic, increases, to that extent, the revenues of the appellants; and if there be a profit (however small), there is of course no *loss* to be reimbursed by increasing the local rates. On the contrary the local stations on the South Carolina and Georgia R. R. are benefited by allowing that railroad to participate in the Charleston traffic; because whatever profit may be realized from that traffic, (however small it may be,) has a tendency to reduce the local rates on that railroad and to improve its local service.

All three of the limitations suggested by me are entirely practical.

Though the question of the reasonableness of the rates to Summerville, the shorter distance point, involves (as is herein-after shown) a very difficult problem; it is one which, upon proper evidence, is capable of judicial determination; and there are many cases in the Federal Jurisprudence, in which such questions have been determined by the courts.

It is also entirely practicable to determine whether the competition at Charleston, the longer distance point, subserves the public interest; whether it is real; and whether it is such as to affect rates.

It is also entirely practicable to ascertain whether the rates accepted by the appellants on traffic to Charleston, the longer distance point, yield a profit over the additional cost of the movement of that traffic. For while it is impossible to ascertain the cost of carrying any particular ton of freight, or any particular class of freight, it is entirely practicable to closely approximate how much the expenses of a railroad will be increased by moving a certain traffic, over and above what they would be, if that particular traffic were declined, and such increase represents what is called "*the additional cost of movement.*"

I submit that the practical limitations, which I have suggested, are far preferable to the theoretical "scale of comparison between the dissimilarity of conditions and the disparity of rates" suggested by Judge Severens.

XXXVI.

THE ERROR OF THE MAJORITY OF THE COURT OF APPEALS IN HOLDING THAT COMPETITION BETWEEN MARKET AND MARKET CANNOT BE CONSIDERED.

The following language is used in the majority opinion of the Court of Appeals :

"The appellees claim that the substantial dissimilarity in the circumstances and conditions under which they transport property from Memphis to Charleston, and from Memphis to Summerville, is created by: 1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all-water lines, or by all-rail lines, or part rail and part water routes. 2. The competition of all-rail lines between Memphis and Charleston." * * *

"Does the competition set up by the appellees as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions within the meaning of the said fourth section of the act to regulate commerce?" * * *

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for

the carriage of traffic from any particular locality, unless one line could perform the services if the other did not."

Trans., pp. 130-131.

The steamship rate on hay from Boston to Charleston, is 20 cents per 100 lbs. The steamship rate on hay from New York and Philadelphia, to Charleston, is 14 cents per 100 lbs.; and schooner rates can be obtained from New York to Charleston of 8 cents per 100 lbs. A lake, rail, and schooner rate of 16 cents per 100 lbs. can be obtained from Chicago to Charleston.

See Sections XIV and XV of this argument.

The rate from Memphis to Charleston on hay is 19 cents per 100 pounds.

See Section XVI of this argument.

Hay is shipped to Charleston from Chicago, Boston, New York, Philadelphia, and Baltimore, as well as from Memphis.

One of the defenses relied upon in this case is, that if the appellants charge a higher rate than 19 cents per 100 pounds from Memphis to Charleston, no hay would come over their roads; because the products of the "Eastern Hay Territory," and the "Chicago Hay Territory," would be delivered in Charleston, at rates which would exclude from the Charleston market the product of the "Memphis Hay Territory."

The Commission and the majority of the Court of Appeals held, in effect, that competition between market and market, or between product and product, cannot be considered as affecting the circumstances and conditions under which transportation is conducted.

In the case of *Phipps vs. L. & N. W. Ry.*, Law Rep. (1892), 2 Q. B. 244, Lord Herschell said: "One class of cases unquestionably intended to be covered by the section, is that in which traffic from a distance of a character with the traffic nearer the market, is charged low rates, because unless such low rates were charged it would not come into the market at all. *It is certain unless some such principle as that were adopted, a large town would necessarily have its food supplies greatly raised in price.* So that, although the object of the company is simply

to get the traffic, the public have an interest in their getting the traffic *and allowing the carriage at a rate which will render that traffic possible*, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance from the market to compete with those situated nearer it."

In the case of I. C. C. vs. L. & N. R.R. Co., Judge Clark, holding the U. S. Circuit Court for the Middle District of Tennessee, said: "The public at large is greatly interested in competition, with the more favorable prices which it brings, *and for that purpose, in keeping open the larger markets of the country to all points of production and supply.*"

73 Fed. Rep., p. 420.

In the case of Texas & Pacific Ry. Co. vs. I. C. C., known as the "Import" case, Mr. Justice Shiras, speaking for the Supreme Court, said: "It could not readily be supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, *nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.*"

162 U. S., p. 211.

In the case of the Liverpool Corn Traders' Asso. vs. G. W. Ry Co., decided by the English Railway and Canal Commissioners in 1892, Mr. Justice Wills said: "To destroy the competition between the western ports and Liverpool, *would be to place the Midland markets more or less at the mercy of Liverpool*, and greatly to aggravate the consequences of those disturbances of trade which are continually taking place, whether by the failure of the sources of supply from which Liverpool draws its corn and grain, by difficulties in the labor market, either in the port or on the railway systems, or by any of the unforeseen circumstances which from time to time derange or cripple the trade of a particular district."

8 Ry. & Can. Traf. Cas., p. 120.

In this case, at Circuit, Judge Simonton found as a fact that "if the defendants had not consented with each other to lower

the rate, no hay whatever would come from the hay-producing territory tributary to Memphis, *and all the Southeastern States would be compelled to rely on other portions of the West, North and Northwest for hay.*"

Trans., p. 112.

The "Chicago Hay Territory," or the "Eastern Hay Territory," or both of them, may, at any time, be visited by drouths. The lake and canal route from Chicago may be frozen for months at a time:

Strikes of railroad employes, such as are described in *in re Debs*, 158 U. S., p. 564; or strikes of draymen and workingmen such as are described in *U. S. vs. Workingmen's, etc.*, 54 Fed. Rep., p. 994, may occur at any time at Chicago, at New York, or at any of the Eastern cities from which hay is shipped to Charleston. Congress never intended that "all the Southeastern States" should be "compelled to rely" on any particular city, or territory, for their supply of an article so important as hay.

It will be impossible to keep Charleston and "all the Southeastern States" open "*to all points of production and supply*" (to use the language of Judge Clark), unless the appellants, whose lines run from Memphis, are allowed to carry hay (to use the language of Lord Herschell) "*at a rate which will render that traffic possible.*" And, as found by Judge Simonton, the Memphis traffic will be rendered impossible, if the appellants are forced to raise their rates to Charleston, so as to make them as high as their rates to Summerville.

It is *the fact* of competition, and not *the kind* of competition, that constitutes the substantial dissimilarity in circumstances and conditions.

The Hudson River Railroad runs up the eastern shore of the Hudson River, from New York to Albany. The West Shore Railroad runs up the western shore of that river, from Jersey City to Albany.

According to the theory of the Commission, and the majority of the Court of Appeals, each road may compete for

traffic against other lines on its own side of the river; but neither of them can do anything to promote the traffic upon its own side of the river, in competition with the traffic upon the other side of the river. In other words, New York railroads may compete with New York railroads, and Jersey City railroads may compete with Jersey City railroads; but New York railroads must not compete with Jersey City railroads.

Such refinements may be interesting, but they cannot properly find a place in the construction of a statute intended for the practical administration of the most important commercial interests of the country.

As a matter of fact, the competition "between market and market," is nothing more than competition between the carriers by which those markets are respectively served; and competition between product and product, is nothing more than competition between the carriers by which those products are respectively transported.

Neither markets, nor products, can compete, except by means of their respective carriers.

The Commission, itself, admits that "the strife for trade between different markets seeking transportation for *like* commodities to the same localities is undoubtedly *one of the most potent commercial forces of our time*."

4 I. C. Rep., p. 149, left col. Trammell et al. vs. Clyde S. S. Co. et al.

It is judicially known to the Court that Boston, New York, Philadelphia, and Baltimore are competing markets in the East for the traffic to Chicago and the West.

For twenty years or more the rates from Boston to Western competitive points have been the same as from New York. From Philadelphia and Baltimore the rates are "agreed differentials"—less than New York—the Baltimore rates being also lower than Philadelphia rates. When the rates from New York to Western points are changed, like changes have to be made from Boston, Philadelphia, and Baltimore; the "differ-

entials" as between the Eastern cities being at all times maintained.

Wholesale Prices, Wages, and Transportation, Senate Rep. No. 1394, 2d Sess., 52d Con. Part 1, pp. 429-430.

The Commission has recently considered the matter of said differentials on grain, &c., and refused to disturb them.

7. I. C. Rep., p. 613, N. Y. Produce Exchange vs. B. & O. R.R.

The mere fact that such "differentials" have existed for more than 20 years is, of itself, a recognition of "competition between markets."

If Boston, New York, Philadelphia, and Baltimore have the right to compete with each other, on agreed differentials for traffic to Chicago and the West, they have the right to compete with each other for traffic to Charleston and the South.

If Boston, New York, Philadelphia, and Baltimore have the right to compete with each other for traffic to Charleston, Chicago and Memphis have the right to compete with each other and with Boston, New York, Philadelphia, and Baltimore for traffic to Charleston; and the appellant lines from Memphis have the right to accept such rates to Charleston, as will enable them to participate in the Charleston traffic.

XXXVII.

THE ERROR OF THE MAJORITY OF THE COURT OF APPEALS AND THE
COMMISSION IN HOLDING THAT THE COMPETITION OF ONE
LINE CANNOT BE SAID TO MEET THAT OF ANOTHER,
UNLESS ONE OF THE LINES COULD PER-
FORM THE SERVICE IF THE
OTHER DID NOT.

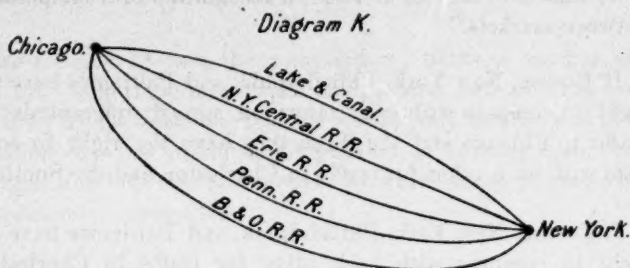
The following language is used in the majority opinion of the Court of Appeals:

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance,

* * * that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic from any particular locality, unless one line could perform the service if the other did not."

Trans., p. 131.

The following diagram "K" represents the principal competing transportation lines, which operate between Chicago and New York. The lake-and-canal route is an all-water line. The other routes are all-rail lines, viz: The N. Y. Central R.R., Erie R.R.; Penn. R.R., and B. & O. R.R.



One of the propositions involved in the extract above quoted is that the competition of the lake and canal all-water line cannot be said to meet that of the four all-rail lines for the carriage of traffic between Chicago and New York, unless said lake-and-canal line could carry all of the traffic passing between Chicago and New York, if the four all-rail lines should cease to compete for it.

I submit, however, that it is not necessary to show that a transportation line is capable of carrying *all* the traffic that passes between its termini.

The Erie Canal is only a little over 300 miles long, and yet Mr. Albert Fink, who was one of the most eminent authorities on the subject of railway transportation, testified before a special committee of the New York Legislature, that "the Erie Canal regulates the freight rates on all the railroads east of the Mississippi River, not only on those whose tracks run parallel with the canal but upon those which run in an opposite direction."

Mr. Fink's statement is strongly fortified by the report (1891) of Hon. Edward Hannan, Superintendent of Public Works of New York.

Of the 110,812,000 bushels of wheat received in the city of New York during the year covered by that report, only a little over one-fourth—30,846,641 bushels—was delivered through the canal; nevertheless, the canal cheapened the rates on the entire aggregate of receipts—the 80,000,000 bushels received by the railroads, as well as the 30,000,000 bushels received by the canal. This saving amounted to over \$4,000,000 in freight charges on wheat alone that went into New York city during that year; to say nothing of the five times greater weight of other freight which went into and out of that city.

See Memorial to 52d Congress of the U. S., in favor of the Improvement of the Navigation of the Mississippi River. St. Louis, 1892, pp. 19, 20.

"The fact that the chief part of our transportation of traffic is performed by railroads, which, in some cases, have taken away one-half, or three-fourths of the business, once performed by navigable streams, does not prove that navigable streams have had their day and gone out of use, and that water carriage has become, or is about to become obsolete; it proves only that the country has grown so great in population, wealth, and diversified interests, that it requires both railroads and rivers to meet the demands of its enormous interchange, and we could not dispense with either."

See said Memorial, p. 15.

"Before the jetties were constructed, the shipments of grain from St. Louis to New Orleans for export to Europe were only about 500,000 bushels a year; now they are 18,000,000 bushels a year, and steadily increasing."

See said Memorial, p. 33.

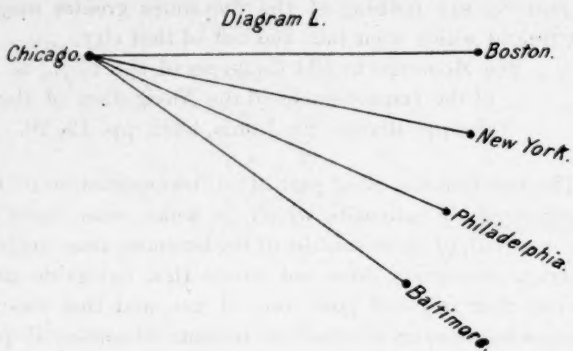
Not more than one-fifth of the freight carried into and out of New York from and to the interior passes through the Erie Canal, and yet that small waterway "has cheapened the cost of carrying on the entire traffic with the West, to the amount of millions—indeed, it might be said, hundreds of millions, in the last twenty years."

See said Memorial, p. 37.

It is said that in England sea competition affects three-fifths of all the station rates in that country ; and yet it is probable that not one one-hundredth of the railroad stations in England are located on the sea.

Acworth on Railways, etc., p. 85, note.

Another proposition involved in the extract quoted from the majority opinion of the Court of Appeals at the head of this section, is illustrated by the following diagram L, which represents the transportation lines running between Boston, New York, Philadelphia, and Baltimore, respectively, and Chicago.



It is quite evident that a line which runs only between Boston and Chicago cannot carry traffic between Chicago and New York ; that a line which runs only between Chicago and New York cannot carry traffic between Chicago and Philadelphia ; that a line which runs only between Chicago and Philadelphia cannot carry traffic between Chicago and Baltimore ; and yet the Court judicially knows that the competition of the lines between Boston and Chicago has for more than twenty years met the competition of the lines between Chicago and New York, as well as of the lines between Chicago and Philadelphia, and of the lines between Chicago and Baltimore. It is because of the fact that the lines running from Boston, New York, Philadelphia, and Baltimore, respectively, to Chicago, meet the competition of each other most effectively, that it has been found necessary, in establishing rates from the East to Chicago, to make the rates from Boston and New York the same, and the rates from Philadelphia and Baltimore certain

“agreed differentials” less than the rates from Boston and New York.

I have heretofore, in section XXXVI of this argument, explained why it is necessary to fix certain relative rates from Boston, New York, Philadelphia, and Baltimore, respectively, to Chicago and the West.

I have shown in section X of this argument that there are three hay-producing territories from which Charleston can be, and is, supplied with hay. One of those territories is represented by Boston, New York, Philadelphia, and Baltimore, as shipping points; another is represented by Chicago, and another by Memphis.

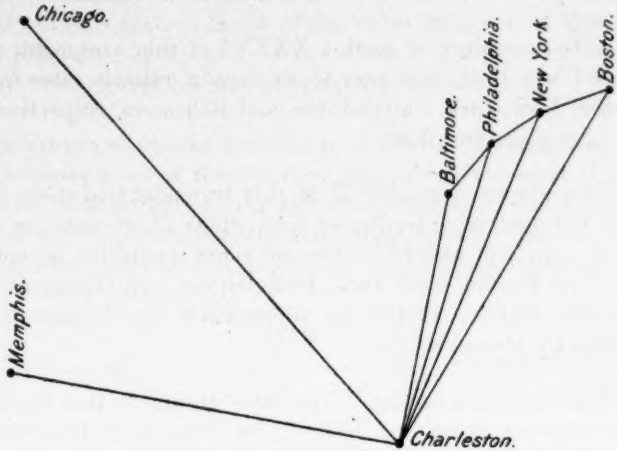
I have shown in section XVI of this argument that the fact as to whether grain and hay will be shipped to Charleston from Boston, New York, Philadelphia, Baltimore, Chicago, or Memphis, depends entirely upon two facts:

First. The price of hay at Boston, New York, Philadelphia, Baltimore, Chicago, and Memphis, respectively, and

Second. The rates on grain and hay from those points respectively to Charleston.

If the price were the same in all six of said markets, viz: Boston, New York, Philadelphia, Baltimore, Chicago, and Memphis, grain and hay would be shipped from that one of those cities which has the lowest rate to Charleston. The city having the lowest rate would have a monopoly of the grain and hay traffic at Charleston, and the transportation lines leading from the other five cities to Charleston would get none of that traffic to carry. It follows that it is absolutely necessary that the lines leading from any one of those six cities to Charleston shall meet the competition of the lines running from every other one of said cities to Charleston; or the lines failing to meet such competition, must abandon the competitive traffic. The competitive situation just referred to is illustrated by the following diagram M.

Diagram M.



XXXVIII.

THE ERROR OF THE MAJORITY OF THE COURT OF APPEALS THAT
COMPETITION BETWEEN MARKETS DOES NOT AFFECT
RATES FROM A PARTICULAR LOCALITY.

The following language is used in the opinion of the majority
of the Court of Appeals:

"We are also of opinion that the competition claimed by the appellees to exist between the different markets—particularly those of Memphis, Chicago, and the North Atlantic ports—to supply the trade of Charleston in the products mentioned, is not in reality the competition that affects rates from a particular locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character, and not connected with the usual conditions under which transportation is conducted, nor does such competition in our judgment create the dissimilar circumstances and conditions referred to in the fourth section of the Act now under consideration."

Trans., pp. 131, 132.

It is manifest that the competition between Boston, New York, Philadelphia, and Baltimore is competition "that affects rates from a particular locality." The competition between those Eastern cities "affects rates" from each of those localities to Chicago. Said competition not only "affects," but it absolutely controls said rates.

And so the competition between New York, Boston, Philadelphia, Baltimore, Chicago, and Memphis for the grain and hay traffic to Charleston and the South is competition "that affects rates from a particular locality."

The competition between New York, Boston, Philadelphia, Baltimore, Chicago, and Memphis "affects rates" from each of those localities to Charleston. Said competition not only "affects," but it absolutely controls said rates; because if the purchase price of grain and hay be the same in New York, Boston, Philadelphia, Baltimore, Chicago, and Memphis, then the rates from those cities respectively to Charleston will not only affect, but absolutely control the question as to which of those cities is to supply the Charleston market.

It is true that the competition referred to is regulated to the extent of the purchase price of grain and hay by "the commercial circumstances" existing at New York, Boston, Philadelphia, Baltimore, Chicago, and Memphis respectively; because the purchase price of grain and hay is one of "the commercial circumstances" existing at those points. But it is a serious error to say that the purchase price of an article which is offered for transportation is "not connected with the usual conditions under which transportation is conducted." The contrary is obviously true; and especially with reference to grain, hay, and other low-class traffic, the freight rate upon which constitutes a material portion of the selling price at point of destination.

Before any of such articles can move, the consignor must ascertain three facts:

First: The price at which the article can be purchased or produced at the point of shipment.

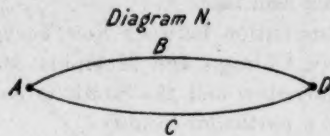
Second: The rate of freight from point of shipment to the point of destination; and

Third: The price at which the article can be sold at the point of destination.

Whether the competition be between two lines, which extend from the same point of shipment, to the same point of destination, or between two or more lines, which extend from different

points of shipment to the same point of destination, is wholly immaterial. The three facts above mentioned are as necessary to be ascertained in the one case, as in the other.

Take the case illustrated by the following diagram "N."



The two competing lines A-B-D, and A-C-D, extend from the same point of shipment (A) to the same point of destination (D).

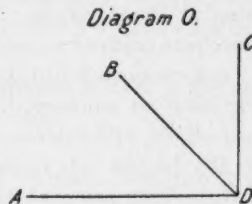
No intelligent merchant would undertake to ship grain or hay, or any other low-class article, from A to D, without ascertaining :

First : The price at which the article can be purchased or produced at A.

Second : The rate of freight from A to D ; and

Third : The price at which the article can be sold at D.

Now take the case illustrated by the following diagram O :



The three competing lines A-D, and B-D and C-D extend from different points of shipment, (A), (B), and (C), to the same point of destination, (D).

No intelligent merchant would undertake to ship grain or hay, or any other low-class article, from either A, or B, or C, to D, without ascertaining :

First : The price at which the article can be purchased or produced at each of the points of shipment (A), (B) and (C).

Second : The rate of freight from each of said points of shipment to (D) ; and

Third: The price at which the article can be sold at (D).

Now if the competition between the two lines A-B-D and A-C-D shown in Diagram N, may be considered, as it was held by this Court in the Alabama Midland Railway case, then why cannot the competition between the lines A-B, and B-D, and C-D, shown in Diagram O, be considered? It is certainly as important for those three lines to be allowed to compete at D, as it is for the two lines shown in Diagram N, to be allowed to compete there; and it is as important that the cities B and C should be allowed to compete in the market D, as it is that A should be allowed to compete there.

If the competition between the lines A-B-D and A-C-D shown in Diagram N may, as held by this Court in the Alabama Midland case, "create the dissimilar circumstances and conditions referred to in the fourth section of the Act," why is it that the competition between the lines A-D, and B-D, and C-D, shown in Diagram O, may not create the dissimilar circumstances and conditions referred to in that section?

XXXIX.

THE ERROR OF THE MAJORITY OF THE COURT OF APPEALS IN
SUPPOSING THAT CARRIERS CLAIM THE RIGHT TO DETERMINE
FOR THEMSELVES WHETHER THE CIRCUMSTANCES AND
CONDITIONS JUSTIFY A GREATER CHARGE FOR THE
SHORTER THAN FOR THE LONGER HAUL.

The following language is used in the opinion of the majority of the Court of Appeals:

"If the carriers were permitted to *determine* such questions, the conflicting results produced by opposing interests would not only cause confusion, but work great injury in many cases to shippers, to localities, and also to certain lines of business, that would be affected thereby."

Trans., p. 132.

Carriers do not claim the right to *determine* such questions. On the contrary, they concede that their judgment on every

such question is fully open to review by the Commission, as well as by the court.

The long and short haul clause has no application, unless the circumstances and conditions are substantially similar.

Carriers must necessarily judge for themselves *in the first instance* whether the circumstances and conditions are or are not substantially similar; but in so doing, they act at their peril, and with knowledge that their judgment is subject to review.

If the Commission or the Court should approve the judgment of the carrier, and hold that the circumstances and conditions are not substantially similar, no injury would result either to "shippers," "localities" or "lines of business;" because no violation of the law would, in such case, be committed.

If, on the other hand, the Commission and the court should disapprove the judgment of the carrier, and hold that the circumstances and conditions are substantially dissimilar, the carrier would be enjoined from charging more for a shorter than for a longer haul; and the matter would be ended. The "questions" involved in such a case are plain commercial questions, dependent upon facts, open to every one, and the tentative judgment formed by the carrier in the first instance is easily re-examined by the Commission and by the court.

XL.

THE ERROR OF THE MAJORITY OF THE COURT OF APPEALS IN SUPPOSING THAT IF CARRIERS BE ALLOWED TO TAKE COMPETITION INTO CONSIDERATION, IT WILL RESULT IN UNJUST RATES.

The following language is used in the majority opinion of the Court of Appeals:

"If the competition of markets, *or of carrying lines*, subject to the provisions of the commerce act, justify carriers in making greater short-haul and lower long-haul charges, over the same line, without an order from the Commission, issued after due investigation, then the unjust rates for transportation existing when that law was enacted, and which it was intended should

be prohibited by it, will continue to be imposed and collected and schedules shall be made, announced, and maintained, to the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others."

Trans., p. 132.

This Court has held in the Alabama Midland Ry. case, that under certain circumstances, the competition of "carrying lines, *subject to the provisions of the commerce act*," may "justify carriers in making greater short-haul and lower long-haul charges, over the same line, without an order from the Commission;" and yet I have never heard that the decision of this Court, in that regard, has resulted in establishing "unjust rates," or rates which operated "to the prejudice of some localities and in favor of others," or "to the destruction of some shippers and to the profit of others."

And if competition between carrying lines, subject to the provisions of the commerce act, has not produced any of the direful results, predicted by the majority of the Court of Appeals, I cannot see why competition of carrying lines, which serve different competing markets should have that effect.

The fourth section of the commerce act does not prohibit a greater charge for a shorter than for a longer haul in any case, except where the circumstances and conditions are substantially similar; and if the competition be such as that it may properly be taken into consideration, and if, when taken into consideration, it renders the circumstances and conditions substantially *dissimilar*, the lower charge for the shorter haul is not prohibited by the law; and therefore it cannot produce any of the illegal and injurious results denounced by the majority of the Court of Appeals.

It is proper at this point to inquire how an order issued by the Commission, after due investigation, could obviate the evil consequences referred to by the Court? If "making greater short-haul and lower long-haul charges over the same line" will result in "unjust rates for transportation" to "the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others," it will do so as well when authorized by the Commission, as when it is not. Surely, a mere relieving order issued by the Commission cannot change the commercial results of any set of rates that may be promulgated under it.

At all events, it was a question for Congress to determine; and Congress saw proper to enact that unless the circumstances and conditions are substantially similar, no application to the Commission for relief is necessary.

XLI.

THE ERROR OF THE MAJORITY OF THE COURT OF APPEALS IN HOLDING THAT THE COMMISSION FOUND THE FACTS AGAINST THE APPELLANTS.

The following language is used in the majority opinion of the Court of Appeals :

"The appellees alleged both before the Commission and the court below, such substantial dissimilarity of circumstances and conditions as justified them in making the greater charge for the shorter haul complained of in the petition, and upon them was the burden of showing affirmatively that such circumstances and conditions were, in fact, substantially dissimilar. The Commission, in ascertaining the facts, *found against this claim* of the railroad companies and entered the order, the enforcement of which was the object of the petition filed by the appellant."

Trans., p. 130.

It is true that the Commission found against "*the claim*" of the railroad companies; but it did not find against *the facts* which were averred by said companies in support of that claim.

"*The claim*" of said companies, as stated both by the Commission, and by the majority of the Court of Appeals, was :

"That the substantial dissimilarity in the circumstances and conditions under which they transport property from Memphis to Charleston and from Memphis to Summerville is created by :

"1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston

by all-water lines, or by all-rail lines, or part rail and part water routes.

“ 2. The competition of all-rail lines between Memphis and Charleston.”

Trans., pp. 130-131, p. 21.

It is true that the Commission found against said “ claim ; ” but its finding was based on matter of law, *and not on matter of fact.*

To illustrate my meaning :

1. The companies averred *as matter of fact* that there was competition of various markets, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points, for the trade of Charleston.

The Commission did not find that fact to be untrue ; but held, in effect, that it was, *as matter of law*, irrelevant ; because “ competition of markets ” could not be considered.

Trans., p. 22.

2. The companies averred *as matter of fact* that there were various all-water lines, all-rail lines, and part rail and part water routes, extending from New York, Boston, Philadelphia, Baltimore, Chicago, and other points, which competed with said companies in the carriage of hay to Charleston.

The Commission did not find that fact to be untrue ; but held that it was, *as matter of law*, irrelevant ; because the competition of no line could be considered that did not reach Memphis.

Trans., pp. 21-22.

3. The companies averred *as matter of fact* that there were various all-rail lines which actively competed for the carriage of hay from Memphis to Charleston.

The Commission did not find that fact to be untrue ; but held, in effect, that it was, *as matter of law*, irrelevant ; because all of said rail lines were subject to the Act to Regulate Commerce.

Trans., p. 21.

I insist that the failure of the Commission to find *the facts*, renders its order in this case illegal ; and therefore, that it was error in the Court of Appeals to order its enforcement.

In the case of The Interstate Commerce Commission vs. Louisville & Nashville R.R. Co., in the U. S. Circuit Court for the Middle District of Tennessee, Judge Clark, in speaking of the report which the Commission is required by law to make, said:

“It is not sufficient, therefore, in a report of its findings of fact and conclusions, to do so in such general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in the case. Stated in another form, it is not sufficient for the report to be made up of mere conclusions with respect either to law or fact. Its opinion or report should show what the issues in the case are, *and what facts it finds* in regard to such issues. The report should make suitable reference to the evidence adduced in regard to any particular question, where there is a conflict in the proof, showing how the Commission settles the disputed fact; or if the evidence in regard to any issue is undisputed, state that fact. *In other words, the report should give the parties to be affected, as well as the Court, in any judicial proceeding afterward instituted, definite and distinct information as to what was found as facts*, and the Commission’s opinion thereon, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigation.”

73 Fed. Rep., p. 414, 415.

In Section II of this argument, I have enumerated seven distinct and important facts which were averred in the answers filed before the Commission; and which facts were relied upon before the Commission as those which constituted the legal defence in this case; and yet the Commission would not find and report whether those basic facts are or are not true.

XLII.

THE ERROR OF THE MAJORITY OF THE COURT OF APPEALS AS TO
THE FORCE AND EFFECT OF CERTAIN COMPETITION
SHOWN IN THIS CASE.

The following language is used in the majority opinion of the Court of Appeals:

“ Does the competition set up by the appellees as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions within the meaning of the said fourth section of the act to regulate commerce? Did such competition in fact *affect rates between Chicago, the North Atlantic ports, and Charleston?* We are of the opinion that it was not of controlling force; and that it was not such *effectual* competition as would constitute the dissimilar circumstances and conditions *which would justify the Commission, upon application to it, in authorizing the carrier to charge less for the longer than for the shorter haul.*”

Trans., p. 131.

There are two singular errors contained in the language just quoted.

1. The question is asked, “ Did such competition in fact affect rates *between Chicago, the North Atlantic ports and Charleston?*” There was no such question in the case. The only question was whether said competition affects rates *between Memphis and Charleston.*

2. The Court says that said competition would not constitute such dissimilar circumstances or conditions as would justify the Commission, upon application, to authorize the carrier to charge less for the longer than for the shorter haul.

Now, the fourth section vests the power in the Commission to authorize such a charge, even though there be no dissimilarity whatever in the circumstances or conditions.

The Commission evidently supposed that it had the power to authorize the carriers in this case to charge less for the longer than for the shorter haul.

Trans., p. 22-23.

I suppose it will be contended by counsel for appellee that the language above quoted contains a *lapsus lingue*; that the majority of the Court of Appeals intended to say that the competition was not such as to affect rates *between Memphis*

and Charleston; and that it was not such as to authorize the carriers to charge less for the longer than for the shorter haul *in advance* of an application to the Commission for permission to do so.

I do not think that the majority of the Court of Appeals intended to find as a fact that the competition referred to did not *as a fact* compel the appellants to accept the low rates which are charged to Charleston; because such a finding would be contrary to the overwhelming weight of the testimony. There is absolutely no testimony to explain why the appellants accept the low rates to Charleston, except that they are forced to do so by the competition between themselves, and the competition between them and the lines from Chicago, New York, Boston, Philadelphia, Baltimore, etc., to Charleston.

It seems to me that the majority of the Court of Appeals did not intend to decide any question of *unmixed fact*; and that the most that it did intend to do was to decide certain questions of *mixed law and fact*. In other words, all that it intended to do was to decide that even if the facts were as averred and proven by the appellants, they did not in law constitute a justification.

When the Court said that certain competition does not "in fact affect rates between Chicago, the North Atlantic ports, and Charleston," it only meant to say that the rates were not in fact affected *in contemplation of law*.

So, when the Court said that certain competition was "not of controlling force," it only meant that *in legal contemplation*, the competition was not "controlling."

I am borne out in this suggestion by the following language which immediately succeeds that which is quoted above at the head of this section. The majority of the Court say:

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance, because of water competition, the transportation as to which such competition exists must be concerning freight to the

longer distance point, which if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for the carriage from any particular locality, unless one line could perform the service if the other did not."

Trans., p. 131.

XLIII.

THE ERROR OF THE MAJORITY OF THE COURT OF APPEALS IN HOLDING THAT NOTHING BUT WATER COMPE- TITION CAN BE CONSIDERED.

The following language is used in the majority opinion of the Court of Appeals:

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance, because of water competition, the transportation as to which such competition exists must be concerning freight to the longer distance point, which, if not carried to such point by the road giving the rate complained of, *could reach that point by water transportation; etc.*"

In section XIII of this argument, I have enumerated four all-rail lines, which with their connections actually compete for the transportation of hay and other traffic from Memphis to Charleston. There was no proof however, that hay or other traffic could reach Charleston from Memphis, by *water* transportation. It was conceded that all of the rail lines competing between Memphis and Charleston were subject to the Act to Regulate Commerce, and inasmuch as no water competition could be shown between *Memphis* and Charleston, the majority of the Court of Appeals and the Commission held that the competition between said all-rail lines could not be considered. The decision of the Commission as well as that of the majority of the Court of Appeals, in this case, was rendered before the case of the Interstate Commerce Commission vs. Alabama

Midland Railway Co. was decided by this Court, in which it was held that competition between all-rail lines, even though they be subject to the Act to Regulate Commerce, may be considered.

168 U. S., pp. 164, 169.

I. C. C. vs. Alabama Midland Ry. Co.

XLIV.

THE ORDER MADE BY THE COMMISSION IN THIS CASE IS NOT LAWFUL UNDER THE THIRD SECTION OF THE ACT.

Though the Commission may have erred in basing the order made by it in this case on the fourth section, yet if said order is lawful under the third section (which I deny), the Court has power to enforce it.

Though the circumstances and conditions at Charleston may be substantially dissimilar from those at Summerville, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains ; and if it can be shown that the disparity in rates constitutes an *undue* preference of Charleston, the rates may be declared to be unlawful. But before a violation of the third section can be established, it must be shown that the disparity of rates, as between Charleston and Summerville, however considerable it may be, constitutes not only a preference, but an *undue* preference in favor of Charleston.

The third section of the Act to Regulate Commerce was modeled upon the second section of the English Railway and Canal Traffic Act of 1854, and upon section 11 of the English Railway and Canal Traffic Act of 1873. For the convenience of the Court, I print in parallel columns so much of said sections as are material for the present purpose :

UNDUE PREFERENCE CLAUSE.

English Act.

SEC. 2. Railway and Canal Traffic Act, 1854.—1 *Nee. & Mac.*, p. 2.

SEC. 11. Railway and Canal Traffic Act, 1873.—1 *Nee. & Mac.*, p. 11.

UNDUE PREFERENCE CLAUSE.

American Act.

SEC. 3. Act to Regulate Commerce.

That it shall be unlawful for any common carrier subject to the pro-

. And no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever. —1 *Nev. & Mac.*, pp. 2-11.

visions of this Act to make or give any *undue* or *unreasonable* preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.—24 *U. S. Stat. at Large*, p. 380.

XLV.

ONLY SUCH DISCRIMINATIONS OR PREFERENCES AS ARE UNJUST OR UNREASONABLE ARE PROHIBITED.

In the case of Interstate Commerce Commission vs. Baltimore & Ohio Railroad Co., Mr. Justice Brown, speaking for this Court, said :

“It is not all discriminations or preferences that fall within the inhibition of the statute; *only such as are unjust or unreasonable.*” . . . “Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust.”

. 145 U. S., pp. 276, 277, *I. C. C. vs. B. & O. R. R.*

In the case of Interstate Commerce Commission vs. Alabama Midland Railway Co., Judge Bruce said :

“The words ‘any undue or unreasonable preference or advantage’ plainly imply that every preference or advantage is not condemned, *but such, only, as are undue or unreasonable.*”

69 Fed. Rep., pp. 231, 232.

In the case of the Commercial Club of Omaha vs. Chicago & N. R. Co., decided November 18, 1897, the Commission, speaking through Commissioner Knapp, said :

“It must be remembered that not every inequality in rates constitutes a violation of the law. *Discrimination is forbidden*

only when it is unjust. Preferences and prejudices are not prohibited unless they are undue. The language of the statute implies that there may be discriminations which are not unjust and preferences which are not undue."

7 I. C. Rep., p. 404.

It goes without saying that where lower rates are charged to one city than to another, and those cities are competitors in a common territory, such disparity of rates constitutes a preference in favor of the one, and a prejudice or discrimination as against the other.

But the question still remains whether the preference, or prejudice, or discrimination is *undue or unjust*.

DIAGRAM No. 4.



In the above diagram, suppose A-C to represent a railroad owned by one company, and A-B to represent a railroad owned by a different company. Suppose B and C are cities which compete in the territory which lies between them. If the company owning the railroad A-C puts in a line of rates on traffic from A to C materially lower than the company owning the other railroad charges on traffic from A to B, such a disparity of rates will constitute a preference in favor of C and a prejudice or discrimination against B; because it will enable C to compete at an advantage over B in the territory which lies between them. But such preference or prejudice is not *undue or unjust*.

Merchants at B would have no ground of complaint against the line A-C, because it carries no traffic to or from B.

4 I. C. Rep., p. 65, Eau Claire Board of Trade vs. C. M. & St. P. Ry. et al., 4th head note.

Nor would merchants at B have any complaint against the line A-B, because the reduction in rates on traffic from A to C, which alone created the disparity of rates, was not made by the line A-B, but by the line A-C, over which the line A-B has no control. Even if the same company owned both lines, the mere fact that it made a material reduction in the rates on traffic from A to C would not of itself establish the fact that the preference in favor of C was *undue*, or that the prejudice or discrimination against B was *unjust*. The competition existing at C might compel the company to accept on traffic from A to F, rates much lower than it otherwise might reasonably charge.

XLVI.

COMPETITION IS ENTITLED TO BE TAKEN INTO CONSIDERATION
UNDER THE THIRD SECTION, AS WELL AS UNDER THE
FOURTH SECTION OF THE ACT.

In the case of Texas & Pacific Ry. vs. I. C. C., 162 U. S., p. 232, this Court quote approvingly the following statement made by Jackson, Circuit Judge, in the case of I. C. C. vs. B. & O. R. R. Co., 43 Fed. Rep., p. 53:

“The English cases establish the rule that, in *passing upon the question of undue or unreasonable preference or disadvantage*, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the Company, and the situation and circumstances of the respective customers with reference to each other as *competitive* or otherwise.”

162 U. S., p. 232, Tex. & Pac. Ry. vs. I. C. C.

In the same case, this Court in discussing the third section says :

“ In passing upon questions arising under the Act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, *and in considering whether any particular locality is subjected to an undue preference or disadvantage*, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, *competition that affects rates should be considered*, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not *undue and unjust*, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered,” etc.

162 U. S., pp. 233, 231, Tex. & Pac. Ry. vs. I. C. C.

In the case just referred to, the “ competitive ” routes were either all-water lines from Liverpool, via Cape Horn, to San Francisco ; or water and rail lines from Liverpool, via the Isthmus of Panama, to San Francisco ; or water and rail lines from Liverpool to various Atlantic and Gulf ports in the United States, and thence to San Francisco. One of the questions argued in that case was, whether either of said “ competitive routes ” was “ subject to the Act to Regulate Commerce ; ” and the Commission declined to recognize that case as deciding that competition between carriers which are “ subject to the Act to Regulate Commerce ” can be considered in determining whether a certain preference or advantage is undue or unjust. That question was definitely settled by this Court in the subsequent case of the Interstate Commerce Commission vs. Alabama Midland Ry. Co., 168 U. S., pp. 164, 167.

Though, as conceded in Section XLIV of this argument, it is competent for the court in this case to determine whether the disparity in rates between Charleston and Summerville constitutes an *undue* preference of Charleston within the purview of the third section, yet under the cases just cited, I contend that the competition existing at Charleston is entitled to precisely the same consideration under the third section, as it is under the fourth section of the Act.

In the case of I. C. C. vs. C. N. O. & T. P. Ry. Co. (known as the Social Circle Case), Newman, J., said :

"As to the question of undue preference, under section 3 of the Act to Regulate Commerce, it may be stated that, unless the traffic involved here is obnoxious to the fourth clause of the Act, it can hardly be said to be an undue preference in favor of Augusta (the longer distance point), or an undue prejudice or disadvantage against Social Circle (the shorter distance point). In the Party Rate Case (Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co., 145 U. S., 263, 12 Sup. Ct. Rep., 844), the Supreme Court says :

'But, so far as relates to the question of "undue preference" it may be presumed that Congress, in adopting the language of the English Act, had in mind the constructions given to these words by the English Courts, and intended to incorporate them into the statute. . . . In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of condition, and a change of circumstances, justifies an inequality of charge.'

"So that unless the rates complained of, as compared with each other, violate the fourth section of the Act, there seems to be very little ground for claiming that they violate the 'undue preference' provisions of the third section."

56 Fed. Rep., 947, 948.

XLVII.

THE MERE FACT OF COMPETITION DOES NOT RELIEVE A CARRIER;
BUT COMPETITION THAT AFFECTS RATES AND SUB-
SERVES THE PUBLIC INTEREST MAY DO SO.

Counsel for appellee may refer to the following language used by this Court in the Alabama Midland Railway case, viz:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the *mere* fact of competition, *no matter what its character or extent*, necessarily relieves the carrier from the restraints of the third and fourth sections," etc.

168 U. S., 167.

I do not contend "that the *mere* fact of competition, no matter what its character or extent," necessarily "relieves the carrier from the restraints of the third and fourth sections." My only contention is, that "competition *that affects rates* should be considered." And that proposition has been decided by this Court, both in the case of the Texas & Pacific Ry. vs. I. C. C., 162 U. S., 233; and in the case of I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., p. 166.

Counsel for appellee may also refer to the following language from the opinion of this Court in the Alabama Midland Railway case, viz:

"The competition may, in some cases, be such as, *having due regard to the interests of the public and of the carrier*, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

168 U. S., p. 167.

I contend that the competition at Charleston "ought justly to have effect upon the rates," if we are to have due "regard to the interests of the public."

As said by this Court in 168 U. S., pp. 165-166, and in 162 U. S., pp. 233-234, "the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment."

The "places of shipment" include Memphis, Chicago, Boston, New York, Philadelphia, and Baltimore. The communities occupying the localities where the goods are "delivered," include the community at Charleston, as well as the community at Summerville.

The welfare of Memphis, Chicago, Boston, New York, Philadelphia, and Baltimore, and the welfare of Charleston are to be considered, as well as the welfare of Summerville. Memphis, Chicago, Boston, New York, Philadelphia and Baltimore are entitled to the advantage which accrues to them from the competition afforded by the various competing lines which extend from those cities to Charleston. And Charleston is as much entitled to the advantage of the fact that it can avail itself of the competition which exists between those various competing lines, as Summerville is entitled to avail itself of the advantage of the fact that it is somewhat nearer than Charleston to Memphis.

Phipps vs. L. & N. W. Ry. Co., Law Rep. (1892), 2 Q. B., 329, et seq.

The Phipps case was cited approvingly by this Court in 162 U. S., 224, T. & P. Ry. vs. I. C. C.; and 168 U. S., p. 164, I. C. C. vs. Alabama Midland Ry. Co., et al.

I also contend that the competition at Charleston "ought justly to have effect upon the rates," if we are to have due "regard to the interests" of the appellant carriers.

The rates from Memphis to Charleston yield the carriers a small margin of profit over the additional cost of the movement of that traffic; and it is to the fair interests of the appellants to be allowed to earn that margin of profit, however small it may be. It is by making small "margins of profits," on large volumes of low-rate traffic, shipped between competitive

points, that much of the revenue of railroad companies in this country is earned.

So long as there is any "margin of profit" at all, the appellants sustain no *loss* in the carriage of traffic to Charleston; and therefore they are under no temptation to increase the rates to the shorter distance points to recoup against loss. In other words, to paraphrase the language of this Court, "having due regard to the interests of the public, as well as of the appellant carriers, the competition at Charleston ought justly to have effect upon the rates;" and the Commission ought, in this case, to have allowed the appellant carriers to take that competition into consideration, notwithstanding it was competition between carriers *confessedly amenable to the Act to Regulate Commerce*; and between carriers serving different competing markets.

XLVIII.

THE MERE FACT THAT THE DISPARITY BETWEEN THROUGH AND
LOCAL RATES IS CONSIDERABLE DOES NOT OF ITSELF
SHOW THAT THE PREFERENCE OR ADVANTAGE
IS UNDUE OR UNREASONABLE.

In the case of the Texas & Pacific Railway vs. Interstate Commerce Commission, 162 U. S., 219, 220, this Court say:

"The mere circumstance that there is, in a given case, a preference or an advantage, does not of itself show that such preference or advantage is *undue* or *unreasonable* within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is *undue* or *unreasonable*."

In the same case, on page 239, the Court say:

"The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the Court in finding that such disparity constituted an undue discrimination—much less did it justify the Court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm or corporation complaining that he or they had been aggrieved by such disparity."

In the case of the Savannah Bureau of Freight & Transportation vs. the Charleston & Savannah Ry. Co., 7 I. C. Rep., p. 480, the Commission having decided that certain shorter distance rates involved in that case were not a violation of the fourth section, says :

"Whether those rates are in violation of the third section, in that they give an undue preference to the more distant point, is a different question which might arise in cases of this kind. It is incidentally raised by the allegations in this complaint, but was not relied upon on the trial. There is nothing in the case which bears upon it except the mere fact that the rate to the intermediate point is higher. Under these circumstances we have not considered the question as fairly before us, and do not pass upon it in disposing of the case."

I have shown in Section XXIV of this argument, that in the case at bar, the Commission based the order in controversy upon the fourth section, and that all other questions that might have been raised and decided were treated by the Commission as immaterial ; and in that respect the case at bar is analogous to the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., just referred to. And so in the case at bar, as in that case, there is nothing which bears upon the question of undue preference "*except the mere fact that the rate to the intermediate point is higher.*"

Under the authority of the case of the Texas & Pacific Railway vs. I. C. C., as well as under the authority of the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., cited above, I contend that there is no sufficient evidence in the record in this case to justify this Court in declaring that the mere disparity in rates between

Summerville and Charleston constitutes an undue preference in favor of the latter, or an undue prejudice against the former.

In the case at bar, this Court is asked by counsel for the appellee to do precisely what the Commission refused to do in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., viz: to declare that the appellants have given undue preference to the longer distance point, when there is nothing in the case which bears upon that question, except the mere fact that the rates to the shorter distance point are higher. This Court is asked to do the very thing for which it reversed the Court of Appeals in the case of Texas & Pacific Railway vs. Interstate Commerce Commission, namely, to declare that the mere fact that the disparity between the through and the local rates is considerable, warrants the Court in finding that such disparity constitutes "an undue discrimination." It is certain that this Court has no more evidence before it in this case, than the Commission had before it in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., or the Court of Appeals had before it in the case of the Texas & Pacific Railway Co. vs. I. C. C., upon which to predicate a decree that the rates in controversy are violative of the third section.

XLIX.

THE CONTENTION OF APPELLEES WOULD LEAD TO THE ADOPTION
OF MILEAGE RATES, WHICH ARE IMPRACTICABLE IN
THIS COUNTRY.

Counsel for the appellee may contend that while some difference between the rates to Summerville and the rates to Charleston may be justifiable, the present differences are too great. He does not suggest what the differences ought to be, other than that the rates to Summerville ought not to be higher than the rates to Charleston.

Under the order made by the Commission in this case the appellants are enjoined from charging any greater compensa-

tion to Summerville than to Charleston ; but they are not enjoined from charging as great compensation to the former as to the latter. Such an order is intelligible under the *fourth* section ; but it is wholly unintelligible under the *third* section.

If it constitutes undue preference in favor of Charleston, to charge less to Charleston than to Summerville, it constitutes unjust prejudice against Summerville to charge as much to Summerville as to Charleston. If distance is to be the controlling factor in determining whether undue preference, or undue prejudice, exists in a given case, *all rates must be constructed upon a mileage basis* ; and instead of permitting the appellants to charge as much to Summerville as to Charleston, the Commission should have ordered the appellants to charge less to Summerville ; and to so reduce their rates to Summerville as to make them the same per ton per mile as those charged to Charleston. In a word, the Commission (if it has the power to prescribe future rates) should have ordered the appellants *to construct their tariffs on a mileage basis*.

The theory of equal mileage rates is entirely correct in all cases *where competition does not interfere with it*. But in cases where competition does interfere, the theory of equal mileage rates cannot be adopted in actual practice ; and though it has been proposed in every country, it has been abandoned by all.

In the report of the case of *Ransome vs. E. C. Ry.*, on page 71 of 1 Nev. & Mac., in Note 6, there is an abstract from the report of the English Parliamentary Committee upon the amalgamation of railways in 1872, in which they declare equal mileage rates to be impracticable.

“First, because *it would prevent railway companies from lowering their rates so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition, and the company of a legitimate source of profit.*”

Second, “it would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual, goods brought in large and constant quantities, *or from*

carrying for long distances at a lower rate than for short distances."

The report continues: "In short, to impose equal mileage rates on the company would be to deprive the public of the benefit of much of the competition which now exists, or has existed; to raise the charges on the public in many cases where the companies now find it to their interest to lower them; and to perpetuate monopolies, in carriages, trade and manufacture, in favor of those routes and places which are nearest and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, not that the rates they themselves pay are too high, but that the rates which others pay are too low."

In March, 1885, the Senate appointed a select committee on Interstate Commerce. The committee took a mass of testimony, filling a volume of 1,450 pages; and made a report which, with its appendix, fills over 200 pages, and in its report, it embodied the report of the English Parliamentary Committee, quoted above.

See Report of Senate Select Committee on Interstate Commerce, Jan., 1886, p. 57.

In the case of *I. C. C. vs. Alabama Midland Ry. Co.*, Judge Bruce said: "In the case at bar there are questions of competing lines; and the proposition of the complainant is that, notwithstanding this, the circumstances and conditions are substantially the same, and that it is in violation of the fourth section of the statute to charge more for the short haul to Troy, the shorter distance, than to Montgomery, the longer distance point. This argument proceeds upon the view that distance is the controlling factor on a question of rate for transportation of property; and yet *these other matters may be, and often are, more controlling than even distance itself.*"

69 Fed. Rep., p. 231, *I. C. C. vs. Alabama Midland Ry. Co.*

In the case of *Imperial Coal Co. vs. Pittsburg & L. E. R. Co.*, it was held by the Commission that "in determining the question of undue prejudice from a rate, distance is only one of

the factors, and other material facts, such as character and quality of the commodity, cost of production, *extent and nature of the competition in the business itself and by other transportation lines*, and the interests of the public in the use of the commodity and its market cost, are to be considered."

2 I. C. Rep., p. 436, Imperial Coal Co. vs. Pittsburg & L. E. R. Co., 3d head note.

In the case of Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., decided December 31st, 1897, the Commission said: "Upon the other hand, *it often happens that distance is altogether disregarded*, and it has been held that this may be proper within certain limits and under certain conditions."

7 I. C. Rep., p. 474, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co.

In the case at bar the Court is asked to hold that the mere fact that a greater rate is charged for a shorter than for a longer distance, constitutes an undue preference of the longer distance point over the shorter distance point. The charge of undue preference *is based upon distance alone*, and it must be sustained, if at all, upon the theory that distance must control in rate-making, to the disregard of all other circumstances and conditions.

L.

NEITHER THE COMMON LAW, NOR THE ACT TO REGULATE COMMERCE, REQUIRES EQUALITY OF CHARGE, EXCEPT WHERE THE SERVICES ARE SIMILAR.

The following language is used in the majority opinion of the Court of Appeals in this case:

"This statute was intended to prevent *any and all kinds of discrimination in favor of localities, individuals, or corporations, and to put all shippers on the same footing—that of perfect equality.*"

Trans., p. 132.

In the case of *I. C. C. vs. E. T. V. & G. Ry. Co. et al.*, Judge Severens says: "Now I think that no one can read these schedules fixing the rates of through traffic from the seaboard to Chattanooga (the shorter distance point in that case), and to Nashville and Memphis (the longer distance points) through Chattanooga, without being instantly and strongly impressed that there is something wrong in the principle on which such rates are adjusted, and that the *equality* which the Commerce Act was enacted to secure has been utterly disregarded."

85 Fed. Rep., p. 110.

Again he says: "If for such causes as existed here such *unequal* charges can be made along the same line of traffic, the inevitable result must be that the Commerce Act will prove of no value, and the leading principle of the common law relating to the same general subject will be overthrown."

85 Fed. Rep., p. 113.

Neither the common law nor "the Commerce Act" requires "equality" of charge, *except where the services are similar*.

In the case of *I. C. C. vs. B. & O. R.R.*, 145 U. S., 275, Mr. Justice Brown, speaking for this Court, says: "Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat., 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; (citing cases) though the weight of authority in this country was in favor of an *equality of charge* to all persons *for similar services*."

It has been held by this Court in the "Import Case," as well as in the "Alabama Midland Ry. Case," that the service rendered by a carrier in the transportation of traffic to a competitive point is not "similar" to the service rendered in the transportation of traffic to a non-competitive point; and therefore a person shipping to a non-competitive point is not

entitled to an "equality" of charge with one shipping to a competitive point.

In *ex parte Koehler*, 31 Fed. Rep., p. 321, Judge Deady said: "The places between which competition in transportation exists between water crafts and railways, *or even the latter*, always will and must send and receive freight at lower rates than others not so favored. This is the result of natural advantage, supplemented often by exceptional sagacity and enterprise, and it would be folly in the Legislature to prevent it if it could. As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control."

In the case of *Brewer & Hanleiter vs. Central of Georgia Railway Co.*, 84 Fed. Rep., p. 268, Judge Speer said: "Shall government undertake the impossible but injurious task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce. The Act to Regulate Interstate Commerce has no such purpose, and yet this appears to be the inevitable result of the decree the complainants seek in the case, without any adequate corresponding advantage either to themselves or to the community in which they live."

If the law be that all persons are entitled to an "equality" of charge, there would be no use for the first section of the Act which requires that rates be reasonable; nor for the second section of the Act which prohibits unjust discrimination; nor for the third section of the Act which prohibits undue preference; nor for the fourth section of the Act which prohibits a greater charge for a shorter distance than for a longer distance, etc. If the law be that all rates shall be equal; or that all rates shall be equal in proportion to mileage; the first four sections of the Act are wholly unnecessary.

LI.

THE PREFERENCE WHICH EXISTS IN FAVOR OF CHARLESTON IS
DUE TO HER NATURAL ADVANTAGES, AND NOT TO
THE FAULT OR CONTRIVANCE OF
THE APPELLANTS.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge
Severens says :

"If the fact of such competition is allowed to become a *dominating* factor in fixing the relative charges of transportation to the different places along the lines, those communities where there is no competition must be blighted by the disadvantage with which they are burdened, and the favored places grow prosperous in the sacrifice of others." . . .
"With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever. At least this would seem to be the very probable tendency."

85 Fed. Rep., p. 113.

If the fact of competition is *not* to be allowed to operate as a *dominating* factor in fixing the relative charges for transportation, then it must be prohibited or stifled altogether. Because, if competition be allowed to operate at all, it *necessarily* becomes a *dominating* factor in fixing the relative charges for transportation to the different places along the line of a railroad.

As said by Judge Deady :

"The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freight at lower rates than others not so favored."

31 Fed. Rep., p. 321, Ex Parte Koehler.

We are therefore confronted with the question as to whether it was the intention of Congress, in passing the Act to Regulate Commerce, to prohibit or stifle competition.

The fifth section of the Act which prohibits pooling, is alone sufficient to show that Congress had no such intention. It expressly prohibits every contract, agreement or combination for pooling; and pooling was prohibited because it was supposed to have a tendency to stifle competition.

In the case of I. C. C. vs. B. & O. R. R. Co., Mr. Justice Brown, speaking for this Court, said that:

"It was not the design of the Act to stifle competition."

145 U. S., p. 281, I. C. C. vs. B. & O. R. R. Co.

If it was not the design of the Act to stifle competition, and if the necessary effect of competition is to enable those places between which competition exists to send and receive freight at lower rates than others not so favored, are the competing lines to be censured for the disadvantage under which those places labor at which no competition exists?

Judge Severens speaks of the shorter distance points as being "*blighted* by the disadvantage with which they are burdened." Now, if it be conceded for the sake of argument that he is correct in describing them as "*blighted*," are the competing lines censurable for the "*blighted*" condition of those places?

The question is well answered by Judge Deady, as follows:

"It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly, for the purpose of putting the one place up, or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the Legislature declared to be a reasonable rate, or abandon the field and let its road go to rust."

23 Fed. Rep., 533, Ex Parte Koehler.

In another case Judge Deady said:

"Freight carried to or from a competitive point, is always carried under substantially *dissimilar* circumstances and con-

ditions from that carried to or from non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than for a short one. When each haul is made from, or to, a non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is willfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case, the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or abandon the field, and let its road go to rust."

31 Fed. Rep., 319, Ex parte Koehler.

LII.

CHARLESTON IS NOT UNDULY FAVORED BY THE APPELLANTS.

Judge Severens speaks of the longer distance points as "favored places," and says that they "grow prosperous in the sacrifice of others."

In what sense is Charleston "favored"? Is it "favored" in any other sense than that the rival lines centering at that point compete with each other as the Interstate Commerce Act allows them to do? If those lines should enter into any contract, agreement, or combination to pool their freights at that point, and in that way (as is supposed) stifle competition, they would commit an offense against the fifth section of that Act. If they should enter into any "trust" arrangement to control the rates at that point, they would render themselves amenable to the Anti-Trust Law.

166 U. S., p. 290, U. S. vs. Frt. Assn.

The Appellants are therefore placed in this dilemma. If they enter into any contract, agreement or combination to stifle competition at Charleston, they violate one and perhaps two acts of Congress. If they compete with each other, in good faith, at that point, inasmuch as the necessary result of such

competition (as said by Judge Deady) is to reduce the rates at that point, then, according to Judge Severens, they are guilty of "favoring" that point; which is but another way of saying that they give to that point an *undue* and *unjust* preference. It would seem, therefore, "that they are to be damned if they do, and to be damned if they don't."

If it be said that Charleston is "favored" over the local stations on the S. C. & Ga. R.R. in the sense that Charleston is geographically so located as to be situated on the ocean, on two navigable rivers, and to have become the point of intersection of three lines of railway, the fact is admitted; but it furnishes no just ground of complaint either against Charleston, or against the railway lines which center there.

As said by Judge Deady, "It is not the fault of the railways that the shipper, who does business at a competing point, has the advantage of it."

23 Fed. Rep., 533, Ex Parte Koehler.

Neither is it the fault of Charleston or of the merchants who are located there that they have the benefit of the competition which exists there. As said by the English Court of Appeals: "I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competing routes, is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market."

"Why the logical situation, in regard to its proximity to the market, is to be the only consideration to be taken into account, in dealing with the question, as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of advantage which he derives from that favorable position of his works."

Law Rep. (1892), 2 Q. B., p. 242, Executors of Phipps vs. L. & N. W. Ry. Co.

When Judge Severens speaks of the shorter distance points being "blighted by the disadvantage with which they are burdened," it becomes important to ascertain by what disadvantage they are burdened; and by whom that burden is imposed. Is Summerville burdened by any disadvantage except that no competing lines of transportation center there? And is that a disadvantage occasioned by the action of the appellants; or is it a disadvantage which arises solely from the geographical location of that place?

LIII.

CHARLESTON HAS NOT "GROWN PROSPEROUS IN THE SACRIFICE" OF SUMMERVILLE OR OTHER SHORTER DISTANCE POINTS.

When Judge Severens speaks of the longer distance points growing "prosperous in the sacrifice of others," in what sense does he use the word "sacrifice"? Can any one show, or will any one undertake to assert, that prior to the promulgation of the rates which competition has forced the appellants to accept upon Charleston traffic, Summerville enjoyed lower rates than it now enjoys? On the contrary, is it not a notorious fact that the rates to such local stations as Summerville were very much higher than they are now; and is it not manifest that at Summerville, and other local stations, where the rates base upon Charleston, every reduction which competition has heretofore forced in the Charleston rates has inured, to the full extent of such reduction, to the benefit of those local stations? And if that be true, how can it be said that Charleston has grown prosperous "in the sacrifice of those stations"? On the contrary, those stations have been benefited by the reduction in Charleston rates; and Charleston, instead of becoming prosperous "in the sacrifice" of those stations, has shared her prosperity with them.

LIV.

SUMMERVILLE, AND OTHER SHORTER DISTANCE POINTS HAVE
NOT "BECOME POORER;" BUT ON THE CONTRARY
HAVE STEADILY ADVANCED IN WEALTH
AND POPULATION.

Judge Severens, speaking of the rule of charging more for a shorter than a longer distance, where competition compels the lower charge to the longer distance point, says :

"With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever."

It is true that the density of population and of traffic is much greater in the States north of the Ohio, and east of the Mississippi Rivers, than it is in the States south of the Ohio ; but the fact may be accounted for in many ways other than by ascribing it to the difference which it is claimed exists in the method of rate-making in the two territories. The prejudice against slavery which was entertained by all Europe prevented European immigration to the South, and induced it to the North. Among the immigrants, were numerous skilled mechanics and miners, who developed the mining and manufacturing industries of the North ; while the South remained, until after the war, an exclusively agricultural country. Since the war, the industries of the South have become more diversified ; and the local non-competitive stations of the South have prospered since the war in a ratio corresponding with the prosperity of similar non-competitive stations in the North.

It is to the pecuniary interest of every railroad to develop the traffic of its local stations ; and, by that process of development, such stations gradually increase in population, manufactures, etc., until they become so large as to invite the construction of other railroads ; and in time they develop into competing points. The process, however, is gradual, and

necessarily slow ; but it is a *natural* process of evolution. The Commission, however, is not content to await the operation of natural causes ; and it proposes, by an artificial process, to place non-competitive stations upon an arbitrary equality with competitive stations. It is contended that such arbitrary process of leveling the railroad rates of the country is not only authorized, but required, by the Act to Regulate Commerce. On the contrary, Judge Deady said :

“ Congress never intended to make of this act a Procrustean bed, in which the conduct of the business of all the roads engaged in interstate commerce shall be made to conform to one arbitrary rule, without reference to the probable and even unavoidable difference in the conditions and circumstances under which it must be transacted.”

31 Fed. Rep., pp. 320, 321, Ex Parte Koehler.

LV.

THE APPELLANTS HAVE NOT ATTEMPTED TO BUILD UP CHARLESTON AT THE EXPENSE OF SUMMERVILLE.

The majority opinion of the Court of Appeals contains this language :

“ The appellees contend that the smaller charge for the greater distance is, in this case, of great importance to the city of Charleston, as well as to the section of country adjacent thereto, as by means thereof the merchants of that city are enabled to *build up trade that would otherwise be lost to them*. That may be true, but is not the same argument applicable to Summerville and other interior cities along the lines of the roads operated by the appellees between Charleston and Memphis? *In order to build up one locality*, we should not tear down many others ; and justice to one section should not be purchased at the expense of another.”

. Trans., p. 133.

The majority of the Court of Appeals misapprehends the position taken by the appellants in this case. Railroad com-

panies do not claim the right "to build up trade;" or "to build up one locality," "at the expense of another." They do claim the right to recognize the natural advantages which one place has over another, and to meet such rates as competition may force them to accept at a place which possesses superior natural advantages; provided such competitive rates yield something more than the additional cost of transportation. If their acceptance of such competitive rates at places possessing superior natural advantages has a tendency "to build up trade" at such places more rapidly than it can be built up at places which do not possess equal natural advantages, the result is due to natural and commercial causes, and not to the fraud or contrivance of railroad companies.

The South Carolina & Georgia Railroad from Charleston to Augusta passes through a comparatively poor and sparsely settled section of the country, and it would be manifestly to the pecuniary interest of that company, if the trade and population of Summerville and each and every other local station on its line were as great, or even greater, than the trade and population of Charleston.

At Charleston, that company is compelled to share the traffic done at that place with the other all-rail lines and with the other water lines of transportation, which do business at that port; whereas at Summerville and other local stations on the line of the South Carolina & Georgia Railroad, that company would secure the carriage of all the traffic offered for transportation. That company is even more interested in building up the trade of Summerville and its other local stations, than are the merchants and business men who reside there; but it is physically impossible for that company to give to those local stations the same advantages that they would possess if each of them was located where Charleston now is.

The Act to Regulate Commerce declares it to be unlawful for any common carrier subject to the act, "to make or give any undue or unreasonable preference or advantage to any particular . . . locality or any particular description of traffic," etc.

The Act does not hold a common carrier responsible for a preference or advantage, however great it may be, unless it be occasioned by some wrongful act of the carrier.

As between Charleston and Summerville, it must be remem-

bered that Charleston possessed great natural advantages over Summerville, before any of the railroads involved in this controversy were dreamed of.

Charleston was founded in 1680 by an English colony, and during the first century of its existence, it attained great commercial importance.

Before the South Carolina Railway was built, freight from Memphis was carried down the Mississippi River to New Orleans, and thence by ocean to Charleston. From Charleston, it was doubtless hauled in wagons to Summerville, 22 miles, at a wagon rate that was much higher than the railroad rate of 9 cents per 100 pounds.

We see, that in those early days, the "preference or advantage" in favor of Charleston, or the "discrimination" against Summerville, was much greater than it is now. But as the "preference or advantage" in favor of Charleston, or the "discrimination" against Summerville, in those days, was manifestly, the act of God, no one ever assumed to characterize it as "undue," or "unjust." The "preference" or "advantage" which Charleston then enjoyed over Summerville, instead of being denounced as "undue or unreasonable," was recognized as justly due to Charleston, on account of her natural advantage of location; and every one regarded it as perfectly "reasonable" that she should enjoy the blessings which God had given her.

When the South Carolina & Georgia R. R. was constructed from Charleston to Summerville, that company *recognized* the "preference or advantage" which the Almighty had shown to Charleston; but so far from doing anything to increase the "prejudice or disadvantage," under which Summerville then labored, the company reduced the rate from Charleston to Summerville, by exactly the difference between wagon rates, and rail rates.

The completion of the rail route from Memphis to Charleston had the effect to change the *relative* geographical relation which had previously existed between Summerville and Charleston with respect to Memphis; so that Summerville

became geographically nearer than Charleston, to Memphis. And, had there been nothing else in the case, Summerville would have received lower rates than Charleston, from Memphis.

But Charleston can purchase hay in Boston, with a steamship rate of 20 cents per 100 lbs.; or in New York, and Philadelphia, with a steamship rate of 14 cents per 100 lbs., or a schooner rate, from New York, of 8 cents per 100 lbs.; or in Baltimore, with a rail-and-water rate of 17 cents per 100 lbs.; or in Chicago, with a lake, rail and schooner rate of 16 cents per 100 lbs. (See Sections XIV, XV of this argument.) It is impossible, therefore, to prevent Charleston from getting hay at less rates than Summerville; even if the rate from Memphis to Summerville were reduced to 19 cents per 100 lbs., as ordered by the Commission.

The *geographical* relation now existing between Summerville and Charleston with respect to Memphis, is of no consequence, so long as Charleston can use Chicago, Boston, New York, Philadelphia, and Baltimore, as a *base of supplies*. The question is one of *strategical* rather than of *geographical* relations; and Charleston has a better *strategical* position than Summerville can possibly attain.

If the appellant railroad companies should raise the rate from Memphis to Charleston, so as to make it the same as the rate from Memphis to Summerville (i. e., 28 cents per 100 lbs.), the results would be:

First: Memphis would be driven out of the Charleston market.

Second: Appellants' lines of railroad would be deprived of all the traffic which they have heretofore carried from Memphis to Charleston.

Third: Charleston would be deprived of the benefit which she has heretofore enjoyed of having Memphis compete with Chicago, Boston, New York, Philadelphia, and Baltimore in the Charleston market.

Fourth : But Charleston would continue to have lower rates, than Summerville, from Chicago, Boston, New York, Philadelphia and Baltimore.

Fifth : In no event could the relative rate position of Summerville, as compared with Charleston, be in any way improved.

In the case of the Interstate Commerce Commission vs. B. & O. R. R. Co., 145 U. S., p. 281, Mr. Justice Brown, in discussing what would be the effect of requiring the B. & O. R. R. Co. to withdraw the "party-rate" tickets from sale, said :

"If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing."

And so, in this case, if the appellant railroads were ordered to raise the joint through rate from Memphis to Charleston, to the combination rate now charged from Memphis to Summerville, while they would lose a large amount of traffic, Summerville "would gain absolutely nothing."

In considering the question of undue preference as between Charleston and Summerville, it must be borne in mind that while Summerville has the advantage of being nearer than Charleston to Memphis, Charleston has the advantage of having at least three actively competing routes from Memphis ; while Summerville has but one route from Memphis. In the case of the Executors of Phipps vs. L. & N. W. Ry. Co., Law Rep. (1892), 2 Q. B., p. 242, referred to above, the English Court of Appeals used this language :

"It is said that it is unfair to the trader who is nearer the market, that he should not enjoy the full benefit of the advantage to be derived from his geographical situation, at a point on the railway nearer the market, than his fellow-trader, who trades at a point more distant ; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed *that he has two competing routes*, is not as much a circumstance to be taken into consideration, as the geographical position of the other trader, who, though he has not *the advantage of compe-*

tion, is situated at a point on the line geographically nearer the market."

"Why the local situation, in regard to its proximity to the market, is to be the only consideration to be taken into account, in dealing with the question, as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of advantage which he derives from that favorable position of his works." p. 242.

The Phipps case was cited approvingly by this Court, in Texas & Pacific Ry. Co. vs. I. C. C., known as the "Import" case, 162 U. S. 224; and in I. C. C. vs. Ala. Midland Ry. Co., 168 U. S. 164.

I.VI.

THE REDUCTION OF RATES TO SUMMERVILLE AND OTHER SHORTER DISTANCE POINTS WOULD NOT INCREASE EITHER THE TONNAGE OR THE REVENUE OF APPELLANTS' LINES.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et. al., Judge Severens says:

"And although I must express an opinion upon a mere question of policy for the carriers with much diffidence, I am very strongly inclined to the belief that their (the carriers') interests would in the long run be better promoted by adhering more closely to the rules of the statute than was done in the present case, or is likely to be done under the practice which their counsel endeavors to justify."

85 Fed. Rep., p. 113.

The practice to which Judge Severens refers is that of charging more for a shorter than for a longer haul, where competition compels the acceptance of lower rates at the longer distance point. His Honor's idea is that if the shorter distance points were not charged more than the longer distance points,

the traffic of the shorter distance points would be increased, and, in that way, the carrier's revenue would be increased.

His Honor's opinion upon any question of *law* is entitled to the highest respect; for he is one of the most eminent jurists of the country. His opinion, however, as to the probable effect of any particular mode of rate-making is, of course, the opinion of one who has not had a very extended experience in traffic matters. But whatever weight may be given to his opinion upon the subject, his suggestion involves an experiment, the entire expense of which would have to be borne by the carriers.

A similar suggestion was pressed upon Mr. Justice Brewer in the case of *Chicago & N. W. Ry. Co. vs. Dey*, and in reply thereto he said:

"Again it is said that it cannot be determined in advance what the effect of the reductions will be. Oftentimes it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present? *But speculations as to the future are not guides for judicial action.* Courts determine rights upon existing facts. Of course there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect; but the only fair judicial test is to apply the rates to the business that has been done in the past, and see whether upon that basis such rates will be remunerative, or compel the transaction of business at a loss."

35 Fed. Rep., p. 881, *Chicago & N.W. Ry. Co. vs. Dey*.

If the Government of the United States desires to conduct experiments in railroad rate-making, as it has a perfect right to do, it should either defray the expense of such experiments, or guarantee the companies against loss resulting therefrom. If the Government should see proper to exercise its right of eminent domain by appropriating the interstate railroad property of this country to its own use, I believe that the owners of such property would be more than willing to surrender the railroads to the Government, at anything like a fair valuation. But so long as the Government insists upon the railroads being operated by their owners, the owners ought not to be forced to

undertake costly experiments in rate-making which, in the opinion of experienced traffic managers, would result in disastrous failure.

It is fair to assume that the traffic managers of the Southern railroads, who are men of long and varied experience, and some of them of world-wide reputation, are competent judges as to what line of conduct would most tend to increase the revenues of their companies; and the financial condition of Southern railways is such as to justify us in assuming that their traffic managers have every motive to increase their revenues.

Counsel for appellee may quote from an opinion of Hon. Aldace F. Walker, formerly a member of the Commission, in which Mr. Walker expressed the same view as Judge Severens. But it is proper to say that neither Mr. Walker nor Judge Severens has ever had any experience in the operation of railroads in Southern territory. A line of conduct which might be eminently wise in Trunk Line territory, where population and traffic are very dense, might be eminently unwise in Southern territory, where the population is sparse; and the volume of traffic, which is light, is scattered at long intervals, through large sections of country, some of which are incapable of supporting even the few people who inhabit them.

Sometimes a reduction in rates will increase the consumption of certain articles, and in that way increase the traffic, and consequently, the revenue of the railways carrying the traffic. But it is by no means true in all cases. In fact, it is true in no case, except where the rate charged for transportation represents so large a proportion of the market value of the article transported, *that it is practicable for the merchant who sells the article to give the consumer the benefit of the reduction.* To illustrate my meaning:

By reference to the order made by the Commission in this case, it will be noticed that the Commission ordered the appellants to cease from charging any greater compensation in the aggregate for the transportation of "*hay or other commodities*" from Memphis to Summerville than they charge from Memphis to Charleston. If the appellants should elect to comply with the order of the Commission by reducing the

rates to Summerville to the same as the rates to Charleston, it would result in a reduction of 9 cents per hundred pounds on hay. What the reductions would amount to upon other commodities is not shown in the record. Assuming the United States Army ration of 14 pounds of hay per day for a horse to represent the average amount of hay consumed per day by horses, mules etc., a reduction of 9 cents per hundred pounds would amount to less than $1\frac{1}{2}$ cents per day in the feed of a horse.

On a hat weighing six ounces, a difference of even 20 cents per one hundred pounds would amount to only $\frac{75}{1000}$ of a cent. A difference of even 20 cents per hundred pounds on coffee amounts to only 2 mills per pound; and to a consumer purchasing ten pounds of coffee for domestic use, the difference would amount to only 2 cents.

It is manifest that while such a reduction in rates might enable a merchant at Summerville to realize a greater profit on his sales to consumers, it would, in most instances, be of no importance whatever, so far as the consumer is concerned. No one would purchase any more hay, or wear any more hats, or drink any more coffee, because of any such reductions in rates; for, even if the merchant at Summerville were disposed to give the consumer the benefit of the reduction, *the amount is too small to make the change.*

Counsel may refer to what the reduction would amount to on car-load quantities. *But consumers seldom if ever purchase in car-load quantities.* As before stated, unless the reduction in rates be such as that it is practicable for the merchant to give the consumer the benefit of the reduction, (which is seldom, if ever, the case as to car-load quantities) consumption will not be increased; and therefore neither the volume of traffic carried by the railroad, nor the revenue derived from the traffic by the railroad, will be increased.

Counsel may insist, however, that even though the reduction may inure to the benefit of the merchant alone, the merchant is a part of the public, and as such, is entitled to have the reduction ordered in his interest. It must be remembered,

however, that the owners of railroad property are also a part of the public, and that their interests are entitled to some consideration. It seems to be a popular idea that whenever a merchant desires to increase his line of profit, all he has to do is to apply to a railroad commission, either State, or Federal, to have *his* profits increased, by diminishing the profits or dividends of railroad stockholders. Upon this point, in the recent case of Ricketts, Smith & Co. vs. Midland Ry. Co., Law Rep. (1896), 1 Q. B., p. 266, the English Railway Commission, speaking through Collins, J., said :

" I think, therefore, that the reasonableness of the rate is *not to be tried by its effect upon the trade of the persons who have to pay it*. It may be a prudent thing for a carrier to tempt traffic by charging rates much lower than he would reasonably be justified in demanding, having regard to the elements which I have referred to as primarily affecting the reasonableness of the rate ; but this is a question of railway management, which, in my judgment, lies outside our province. *Within these limits he is entitled to get as much as he can, even though he thereby diverts a large part of the merchant's profit into his own pocket.*"

If the rates to Summerville should be reduced, so as to be not higher than the rates to Charleston, it would doubtless, in some instances, induce merchants at Summerville to purchase their goods in Memphis, instead of purchasing them in Charleston ; though even under the present rates, the appellee seems to have made his purchase in Memphis. But the volume of their purchases would be no greater than they have heretofore been. The number of their customers would not be increased ; the amount consumed by their customers would not be increased ; and, therefore, traffic, and the revenue of the railroads, would not be increased. While there might be a *diversion* of a certain portion of traffic from Charleston to Summerville, there would be no substantial *increase* in the aggregate volume of traffic, carried to that vicinity by the appellants.

Unless reductions in rates are such as *to reach consumers and induce them to use more of the articles* upon which the reductions are made, there can be no *increase* of tonnage produced by such reductions.

LVII.

IT IS NOT A PROPER FUNCTION OF GOVERNMENT TO ATTEMPT TO
EQUALIZE EITHER THE BUSINESS FACILITIES OR
SOCIAL RELATIONS OF COMMUNITIES.

Judge Severens further says :

"And public policy would also be advanced by the opposite course, not only in the encouragement which would thus be given to the distribution of commerce and population, but also in extending that *equality* of privilege which it is one of the prime objects of legislation to promote."

85 Fed. Rep., p. 113.

I have shown in Section L of this argument that neither the common law nor the Act to Regulate Commerce requires "*equality of privilege*" *except where the services are similar*; and I shall have nothing further to say upon that point. But as to Judge Severens' suggestion that public policy would be advanced by building up local stations at the expense of competitive stations, I submit that it is no proper function of government to deprive the competitive stations of the natural advantages which they enjoy. When Judge Severens says that public policy would be advanced in the "encouragement which would thus be given to the distribution of commerce and population," he can mean nothing else than that the commerce and population of Charleston, and other large basing points and trade centers in the country, ought, at least to a certain extent, to be taken away from them and distributed among the small local stations on the railroads which center there. In reply, I repeat the language of Judge Deady that :

"As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give to each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control."

31 Fed. Rep., 321, Ex Parte Koehler.

I also repeat the language of Judge Speer :

"There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce."

Brewer & Hauleiter vs. Central of Ga. Ry., 84 Fed. Rep., p. 268.

LVIII.

"BASING POINTS" OR "TRADE CENTERS" IN THE SOUTH.

The Commission is in the habit of inveighing against what are called "basing points" or "trade centers" in the South. They were described by Commissioner Walker, in one of the early cases before the Commission, as follows :

"Certain large cities and towns situated on the coast, at interior river points, and at railroad junctions, are *called* competitive, and receive quite low rates on all interstate traffic ; all other stations are *called* local, and are charged much higher rates. The rates to local points are made by adding to the competitive rates at the nearest competitive point the local rate from that point."

1 I. C. Rep., p. 631, Harwell vs. C. & W. R.R.

It will be noticed that Mr. Walker says that basing points are "*called*" competitive, as if they were so designated as a matter of preference or favor ; and that he speaks of them as "*receiving*" quite low rates, as though such rates were given to them by the carriers as a matter of favoritism or partiality.

Judge Cooley said in another of the early cases that the pre-eminence of such trade centers, in the Southern territory "is peculiar, and has probably been increased by the *concessions* in rates which the railroads have made to them, while making less *concessions* or none at all to less important stations." . . .
"The prevalence of such ideas, and the acting upon them in

making freight tariffs, gives to railroad managers a power of determining within certain limits, what towns shall be trade centers, and what their relative advantages."

1 I. C. Rep., p. 278, In Re Southern Ry. & Steamship Assn.

There may have been a few mere "railroad junctions" which, owing to the ignorance or corruption of certain railroad officials, have been arbitrarily "called" competitive points, and which "received" certain arbitrary "concessions" in rates. There may also have been a few strictly local stations, which were not even "railroad junctions," where arbitrary and unfair "concessions" in rates have been made, by certain corrupt railroad officials, to enhance the value of property owned at such stations by said officials, or by their relatives or friends.

All such arbitrarily created so-called "trade centers," or "basing points," if any such have existed, were the offspring of ignorance or corruption, and justly deserve all that the Commission has said in denunciation of them.

The error of the Commission consists in failing to distinguish between those "trade centers" or "basing points," which may have been "arbitrarily created" by certain railroad officials, at certain local stations, or at certain railroad junctions, and those *natural* "trade centers" or "basing points," which are situated on the sea-coast, or other navigable water course."

Norfolk, Richmond, Wilmington, Charleston, Savannah, Brunswick, Augusta, Macon, Mobile, Montgomery, Columbus, Eufaula, etc., are illustrations of natural "trade centers," or "basing points" which are situated on the sea-coast, or other navigable water course.

Competition between numerous water craft enabled them to command exceptionally low rates of transportation, long before a mile of railroad existed on the face of the earth. It is manifestly erroneous to say that they have been "arbitrarily favored" with exceptionally low rates, by the ignorance or corruption of railroad officials. *Their rates were always very much lower than those of adjacent interior towns.*

When railroads were first constructed to those natural "trade centers," or "basing points," they found them in the enjoyment of exceptionally low rates, as compared with adjacent interior towns; and they simply recognized the rate situation as they found it.

It was impossible for the railroad officials to have increased the rates to those natural "trade centers," or "basing points;" because the same water craft that had reduced the rates in the first instance would have reduced them again, if the railroad officials had attempted to increase them.

Before any railroads were built in the South, traffic from New York and other North Atlantic ports, as well as traffic from Memphis and other Western points, was shipped to Summerville, by water to Charleston; and thence by wagon to destination.

Certain competitive through rates were charged by ships and boats from New York and other North Atlantic ports, or from Memphis and other Western points, to Charleston; and certain local wagon rates were charged from Charleston to Summerville.

Charleston, Savannah, &c., were important natural "trade centers" in those early days; and their prominence over interior towns, such as Summerville, &c., was far greater then than now. Summerville was then, as now, a local, non-competitive point.

The rates from New York and other North Atlantic ports, and from Memphis and other Western points to Summerville, were then, as now, "based" on through competitive rates from New York and other North Atlantic ports, or from Memphis and other Western points to Charleston; to which were added wagon rates from Charleston to Summerville.

We see, therefore, that Charleston is a natural "basing point," for making rates to Summerville; because it is the nearest natural "trade center" to that point.

We see, also, that Charleston, Savannah, &c., are natural

"basing points," or "trade centers," because they are situated on navigable water courses, and in the midst of large and fertile territories which are dependent upon them for commercial facilities; and not because of railroad favoritism.

It may be contended by counsel for the appellee that interior towns, such as Summerville, are entitled to participate in the benefit which has resulted from the construction of railroads; and that they ought not to be remitted to the condition which existed in the days of ox-carts and wagons. I agree that the interior towns are as much entitled as those which are situated upon water courses, to participate in the benefit which has resulted from the construction of the railway system; but I contend that they have been benefited by that system; and benefited even more, in proportion, than the cities situated upon water courses. Instead of paying the high rates formerly charged by wagons, they now have a very much better and more expeditious service by railway. The rates charged by railways are not only much less than those formerly charged by wagons, but the local rates in South Carolina are regulated by the Railroad Commission of that State.

The interior towns, such as Summerville, are not content, however, with having the benefit of all the competition that exists at the "basing points," or "trade centers," with the addition of only such local railroad rates as the South Carolina Railroad Commission may fix as reasonable; but they insist upon having *precisely* the same rates as if they were located *exactly* where the "basing points," or "trade centers," are located.

I submit that Congress never intended to interfere with the commercial advantages possessed by Charleston, or any other city; whether those advantages were due to natural causes, such as location upon a water course; or to artificial causes, such as the aggregation of capital, the exhibition of business enterprise and sagacity, &c.

Congress does not require equality of rates in any case except where there is a similarity of circumstances and conditions. If the circumstances and conditions be substantially dissimilar, it is not the intention of Congress to attempt to equalize them.

LIX.

"BASING POINTS" OR "TRADE CENTERS" IN THE NORTH AND WEST.

"Basing points" or "trade centers" are not confined to the South. Freight tariffs covering the traffic from the Eastern seaboard territory to Western points were, for many years, established under the rules and regulations of the associations then known as the Trunk Line, and Central Traffic associations. Under agreements of several years' standing, it had been the custom of roads, forming by connections through lines from the seaboard to the West, to determine through rates from New York to Chicago, "and to adopt such rates *as the standard or basis* for the construction of tariffs from other Eastern cities, and points adjacent thereto, which are directly or indirectly in competition for Western business."

"For twenty years or more the rates from Boston to Western competitive points have been the same as from New York. From Philadelphia and Baltimore, the rates are "agreed differentials"—less than New York—the Baltimore rates being also lower than Philadelphia rates."

The agreed rates and distances from New York to Chicago are taken as the standard, or 100 per cent. Through rates to the principal Western cities, towns and junction points in the territory above described, are computed at a percentage of the New York-Chicago rates, based generally on the relative mileage of such points to the Chicago mileage. For example, rates from New York to Indianapolis, Ind., are 93 per cent. of the New York-Chicago rates; Cincinnati, O., 87 per cent.; Columbus, O., 77 per cent.; St. Louis, Mo., 116 per cent., etc., etc. Thus the New York-Chicago rates being at all times applied as the basis, would, when changed, create relative changes in the rates to other Western points. In a similar manner the relation as to rates is maintained from the other Eastern cities. When the rates from New York to Western points are changed, like changes are made from Boston, Philadelphia, and Baltimore, and points receiving the same rates;

the "differentials" as between the Eastern cities being at all times maintained.

Wholesale Prices, Wages and Transportation, Senate Rep., No. 1394, 2d Sess. 52 Con., Part I., pp. 429, 430.

And so with reference to through rates from Kansas and Nebraska points to the seaboard. "The through rates to the Eastern seaboard are generally made on the combination of the rates east and west of the Mississippi River."

Wholesale Prices, Wages and Transportation, Senate Rep., No. 1394, 2d Sess. 52d Con., Part I., p. 552.

The rates and distances from New York to Chicago are taken as the base in the territory between those cities, because of the water competition from Chicago to New York via the Lakes, the Erie Canal and the Hudson River; and that line of water transportation is the only practicable water line between the northeastern seacoast and the Mississippi River. But the Southern territory is surrounded on the east and south by the Atlantic Ocean and the Gulf of Mexico; and on the west and north by the Mississippi and Ohio Rivers. It is also penetrated by numerous rivers navigable by steamboats from the ocean for considerable distances into the interior.

It is therefore impossible to adopt in the South any one set of rates, or any particular distance, as a standard for making rates for that entire territory. To illustrate: if it were attempted to take the distance, and the rates, from New York to New Orleans, as a standard or basis, and to fix the rates from New York to Norfolk, or from New York to Charleston, or from New York to Savannah, etc., as certain per cents of the rates from New York to New Orleans, such percentage rates could not be maintained like similar percentage rates are maintained between certain cities in the Trunk Line territory; because they would be cut, in almost every instance, either by the all-water lines, or by the rail-and-water lines.

That peculiar difficulties surround the rate situation in the South is conceded by the Commission, itself, in the following language:

"A study of the conditions under which railroad traffic in

certain sections of the country has sprung up is necessary to an understanding of the difficulties which surround the subject. The territory bounded by the Ohio and the Potomac on the north, and by the Mississippi on the west, presented to the Commission an opportunity, and also an occasion, for such a study. *The railroad business of that section has grown to be what it is in sharp competition with water carriers, who not only have had the ocean at their service, but by means of navigable streams were able to penetrate the interior in all directions.*"

First Annual Report Interstate Commerce Commission (1887), p. 16.

The only possible way by which the basing system employed in the Trunk Line territory could be made applicable in the Southern territory, would be to subject all carriers by water to the Act to Regulate Commerce, and to establish by legislative enactment or otherwise, certain relative maximum *and* minimum rates to and from all of the principal points in the South; and then require all carriers, whether by rail, or by water, to maintain the rates so fixed.

LX.

"COMBINATION RATES" IN THE SOUTH.

The Commission is in the habit of inveighing against what are known as "combination rates."

Such rates are described by Commissioner Walker in one of the early cases as follows:

"The rates to local points are made by adding to the competitive rates at the nearest competitive point, the local rate from that point."

1 I. C. Rep., p. 635, Harwell vs. C. & W. R. R.

I have heretofore explained, in Section XVIII of this argument, how the "combination rates" are made from Memphis to Summerville.

It will be remembered that they are made by adding to the

competitive rates which prevail from Memphis to Charleston, the local rates of the S. C. & Ga. R. R., from Charleston to Summerville, as fixed by the South Carolina Railroad Commission.

It will be noticed that Summerville has the advantage of all the competition that exists at Charleston, and that it is only charged in addition thereto such local rates as the South Carolina Railroad Commission may fix as reasonable from Charleston to Summerville.

As an illustration of the principle upon which the combination rates in this case are made, the rate on hay from Memphis to Summerville is 28 cents per 100 pounds. It is made up of the low competitive rate from Memphis to Charleston of 19 cents, and a local rate, as fixed by the South Carolina Railroad Commission, from Charleston to Summerville of 9 cents, making a total of 28 cents.

There is no complaint that the rate of 19 cents per 100 pounds, from Memphis to Charleston, is unreasonably high. As it is the result of severe competition, the presumption is that it is lower than might, but for that competition, be reasonably charged.

There is no complaint that the rate of 9 cents from Charleston to Summerville is unreasonably high for a shipment originating at Charleston; and, as it is a rate fixed by the South Carolina Railroad Commission, the presumption is that it is very low.

It would seem that a "combination rate" formed of two rates, each of which is just and reasonable, would itself be reasonable.

88 Fed. Rep., p. 194, I. C. C. vs. W. & A. R.R. Co.

Similar rates were attacked in the Alabama Midland Case, and were sustained by the courts in that case.

74 Fed. Rep., p. 717, I. C. C. vs. Ala. Midland Ry. Co.

If the aggregate rate from Memphis to Summerville is to be reduced on hay from 28 cents to 19 cents per hundred pounds,

which amounts to a reduction of 9 cents, the question arises as to whether the reduction shall be made west of Summerville, or east of Summerville. If the reduction should be made west of Summerville it would fall upon all of the appellants; though none of them participate in the 9 cents rate complained of, except the S. C. & Ga. R.R. If it be said that the reduction should be made east of Summerville, then, the entire loss would fall on the S. C. & Ga. R.R.

The appellants whose roads are west of Augusta are under no legal obligation to make joint through rates with the S. C. & Ga. R.R.; and the S. C. & Ga. R.R. is under no legal obligation to make joint through rates with them. It has a perfect right to refuse to recognize any through bill of lading that may be issued by the roads west of Augusta for the transportation of freight from Memphis to Charleston.

37 Fed. Rep., 572, K. & I. Bridge Co. vs. L. & N. R.R. Co.

41 Fed. Rep., 563, L. R. & M. R. Co. vs. St. L. I. M. & S. Ry. Co.

51 Fed. Rep., 474, 475, O. S. L. & U. N. Ry. Co. vs. N. P. R. Co.

52 Fed. Rep., 915, C. & N. W. Ry. Co. vs. Osborne.

59 Fed. Rep., 402, 403, L. R. & M. R. Co. vs. St. L. I. M. & S. Ry. Co.

63 Fed. Rep., 778, 779, L. R. & M. R. Co. vs. St. L. & S. W. Ry. Co.

65 Fed. Rep., 41, St. Louis Drayage Co. vs. L. & N. R.R. Co.

86 Fed. Rep., 419, Gulf C. & S. F. Ry. Co. vs. Miami S. S. Co.

88 Fed. Rep., 662, Southern Indiana Exp. Co. vs. U. S. Exp. Co.

If the S. C. & Ga. R.R. should refuse to-morrow to recognize through bills of lading issued by the roads west of Augusta, and refuse to make joint through rates with those roads from Memphis to Charleston, it would deprive Charleston of one of her competing lines from Memphis; but it would not benefit Summerville in the least.

In the event supposed, hay shipped from Memphis, via

Augusta destined to Summerville would, either go from Augusta via the Port Royal & Augusta Railway and the Charleston & Savannah Railway to Charleston, and thence by the South Carolina & Georgia Railroad to Summerville, by which route the rate would be precisely the same as the present rate, as shown in Section XXII of this argument; or as shown in Section XVIII of this argument, it would be shipped from Memphis to Augusta at a rate of 22 cents per hundred pounds, and from Augusta to Summerville over the South Carolina & Georgia Railroad at a rate of 15 cents per hundred pounds, making a total rate from Memphis to Summerville of 37 cents per hundred pounds, which is 9 cents higher than the present rate.

The mere fact that the S. C. & Ga. R. R. and the roads west of Augusta have endeavored to accommodate the shipping public at the local stations on the line of the S. C. & Ga. R. R. by joining in through rates, and recognizing through bills of lading, which the public have no right to require as matter of law, furnishes no reason for adjudging the Summerville rates to be illegal; especially, as they are made on the lowest possible combination.

Any other view of the question will force the railroads of this country to abandon the system of through rates, and through bills of lading; in order to be allowed to charge their own reasonable rates, on their own roads.

LXI.

"COMBINATION RATES" IN THE NORTH AND WEST.

Combination rates are by no means peculiar to the South.

In its eleventh annual report the Commission says:

"We have before us at the present time a complaint which alleges that the rate from Chicago, Ill., to Kearney, Neb., is discriminating and unlawful. The rate is made in this way: There is an interstate rate from Chicago to Omaha. The rate

from Omaha to Kearney is fixed by the Railroad Commission of the State of Nebraska. The through rate from Chicago to Kearney is made by adding to the through rate to Omaha, the local rate from Omaha to Kearney. Merchandise is transported by continuous shipment upon through bills of lading from Chicago to Kearney at this rate." . . . "We might order a reduction of the whole rate, *but we could not determine how that reduction should be shared by the different carriers.* If the carriers refuse to agree about that, *it is difficult to see how the order could be enforced.* Clearly, to make and enforce such an order we must have power to determine the divisions of this through rate between the different roads making up the joint line.

"KEARNEY IS BUT ONE OF THOUSANDS OF PLACES TO WHICH THE THROUGH RATE IS MADE UPON THIS SAME PLAN. A large part of interstate rates are joint rates, in reference to which the same thing would be true."

11 Ann. Rep., I. C. C. (1897), p. 27.

In this case, if the Court should order a reduction of 9 cents per hundred pounds on hay, from Memphis to Summerville, it could not determine how that reduction should be shared by the four carriers that participate in the transportation; and if those carriers should be unable to agree as to how the reduction should be shared between them it is, in the language of the Commission, "difficult to see how the order could be enforced." Clearly, to make and enforce such an order, the Court must have power to determine the divisions of the reduced through rate between the different roads making up the joint line. The roads west of Augusta could say truthfully that they have never received any part of the 9 cents per one hundred pounds which the Commission ordered to be deducted from the Summerville rate. They could say truthfully that they get exactly the same amount of revenue out of a shipment of hay from Memphis, whether it goes to Charleston or to Summerville; and therefore that they ought not to be required to sustain any part of the loss that would result from the enforcement of the order of the Commission. On the other hand, the South Carolina & Georgia Railroad Co. could truthfully say that if hay is brought to Charleston from Chicago, Boston, New York, Philadelphia, Baltimore, Norfolk, or any other ocean or Gulf port,

and is destined to Summerville, that company is entitled under the rates fixed by the South Carolina Railroad Commission to charge 9 cents per hundred pounds for transporting the hay from Charleston to Summerville, a distance of 22 miles; and that it ought not to be required to carry Memphis hay from Augusta to Summerville, a distance of 116 miles, for nothing; which it would be compelled to do, if it were forced to sustain the entire loss that will result from the reduction ordered by the Commission.

LXII.

THE "SOCIAL CIRCLE" CASE DID NOT DECIDE THAT COMBINATION RATES ARE ILLEGAL.

Counsel for the appellee may refer to what is known as the "Social Circle Case" as holding that "combination rates" are illegal.

In the "Social Circle" case it was held that where two or more roads join in making combination through rates on interstate traffic, such roads constitute but one "line;" and such "line" is subject to the Act to Regulate Commerce; though one of the roads may be wholly within a single State. But it was not even intimated in that case, that a "combination-rate" charged by such a line to a local station on one of the roads constituting the line, is unlawful, merely because the delivering road is allowed its local rate as its proportion of the joint through rate.

162 U. S., pp. 184, 191, 192, C. N. O. & T. P. Ry. vs. I. C. C.

LXIII.

THE "AUGUSTA SOUTHERN" CASE DID NOT DECIDE THAT COMBINATION RATES ARE ILLEGAL.

Counsel for the appellee may also refer to the "Augusta Southern R. R." case, 74 Fed. Rep., 527, as holding that com-

bination rates are illegal. The legality of "combination rates" was not discussed by the Court in that case. The Wrightsville & Tennille R. R., which was one of the roads involved in that case, *was not the delivering carrier*. It was an intermediate carrier, and its service was, in the strictest sense, "through" service. It received the cars at one end of its line, and surrendered them at the other end; *without incurring any of the expense or delay incident to delivery at local stations*.

My information is that the rate discussed by the Court in that case was on phosphate from Charleston, via Augusta, and Tennille to Oconee River landings.

The total rate was.....	\$4 20
It was divided as follows:	
To the roads running from Charleston to Tennille, 326 miles (5½ mills per mile).	\$1 80
To the Wrightsville & Tennille R.R., 36 miles (22 mills per mile).....	80
To the boats on the Oconee River.....	1 60 — \$4 20
The proportion of the Wrightsville & Tennille R.R. added to that of the boats amounted to.....	\$2 40

The Wrightsville & Tennille R.R. had for a long period of time joined with the Augusta Southern R.R., as well as with the Central Railroad, in making through rates on phosphate; and it had accepted from each of them 80 cents as its reasonable proportion of the through rate.

Its local rate from Wrightsville to Tennille was \$1.16. It withdrew from its connection with the Augusta Southern R.R. and proposed to charge that road its local rate of \$1.16, which added to the boat's proportion of \$1.60, made the total proportion from Tennille to the Oconee River landings \$2.76, instead of \$2.40, as it had previously been. The Court held that as \$2.40 had been previously accepted from the Augusta Southern R.R. as reasonable, and as it was still accepted from the Central R.R. as reasonable, the presumption was that the increased rate of \$2.76 was unreasonable as a charge against the Augusta Southern R.R.—especially as the former charge of \$2.40 was continued to be accepted from the Central R.R.

The question in that case was as to the right of a railroad to discriminate as between two of its connections as to the proportion which it would demand out of a through rate. *There was no question as to whether the through rate was reasonable as between the through line and a shipper.*

In the case at bar, counsel, in effect, contends that the S. C. & Ga. R. R. shall be compelled to accept a less rate per ton per mile on the short haul from Augusta to Summerville than competition forces the through line to accept on the long haul from Memphis to Charleston. But in the Augusta Southern Railroad case, the Court allowed the Wrightsville & Tennille R. R. to continue to charge its old rate of 80 cents for 36 miles, which rate was four times as much per ton per mile as was charged by the connecting roads from Charleston to Tennille ; and the only effect of the order in that case was to prohibit the Wrightsville & Tennille R. R. from increasing its proportion from 80 cents to \$1.16, as against the Augusta Southern R. R., while it continued to accept 80 cents from the Central R. R.

LXIV.

THE FACT THAT RATES ARE WHAT IS KNOWN AS "AGREED RATES," IS NO PROOF THAT THEY ARE NOT THE RESULT OF COMPETITION.

Counsel for the appellee may contend that as all of the lines running from Memphis to Charleston charge the same rates to Charleston, and as those rates are what are known as "agreed rates," there is no real competition between those lines at Charleston. Or, to state it differently, that instead of there being competition at those points, there is an agreement *not* to compete.

This position is inconsistent with another position which I have assumed would be taken by counsel, and which I have discussed in Section XXXII of this argument. In the first position, reference is made to the fact that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul

only existed in cases of competition at the longer distance points, and the argument was anticipated that, as Congress knew that fact, it did not intend that competition should be an excuse, except in certain extreme cases, etc.

In that position, the contention would be that competition is the sole cause for charging less for a longer than for a shorter distance ; while in the position now under consideration, the contention is that there is no competition at all at the longer distance points.

Certain traffic agreements between competing railroad companies were considered by this Court in *U. S. vs. Trans-Missouri Freight Association*, 166 U. S., p. 290 ; and *U. S. vs. Joint Traffic Association*, 19 Sup. Ct. Rep., p. 25. The agreements before the Court in those cases were held to be violative of the Anti-Trust Act ; because their effect was to *increase* the rates at the points which they affected.

In the case at bar, no complaint would be made of the rates to Summerville, if the rates to Charleston could be *increased* so as to be not less than the Summerville rates.

As held by this Court, the object of Traffic Association agreements was to restrain within certain limits the competition which existed at the points affected ; and which competition the carriers claimed was ruinous in its effect.

The very fact that such agreements were made, is the best evidence that competition did exist at the points affected ; because the very object of such agreements was to restrict that competition, so that it would not become any more severe.

LXV.

IF THE FAILURE TO CHARGE ACCORDING TO DISTANCE CONSTITUTES AN UNDUE PREFERENCE, ALL RATES WILL HAVE TO BE MADE ON A MILEAGE BASIS.

Counsel for the appellee may contend that, inasmuch as the order of the Commission is simply that the rates to Summer-

ville shall not be higher than those to Charleston, it may be complied with by giving to Summerville, rates as high as those to Charleston; and that this privilege or option given to carriers to make the rates to Summerville as high as to Charleston, *thus ignoring the natural advantage of the former in being the shorter distance point*, is all that can be asked by the carriers, and is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case.

If the Commission had the legislative power to prescribe rates to be charged in the future, as it at one time claimed to have, I could understand such an expression as "the Commission ignoring the natural advantages of shorter distance points."

With an arbitrary rate-making power at its command, it could, with impunity, ignore the natural, or commercial advantages of any city in the Union, and there would be no practical relief, however capricious its action might be.

But, as the Commission has no legislative power, and must act as a quasi judicial tribunal, what right has it to "ignore the natural advantages" of shorter distance points, if they have the legal right to enjoy those advantages?

I have shown in Section XLIX of this argument that if it constitutes unjust preference in favor of Charleston to charge less rates to that place than to Summerville, it constitutes unjust prejudice against Summerville to charge *as high* rates to Summerville as to Charleston; and that if distance is to be the controlling factor, the rates to Summerville, and to Charleston, respectively, as well as all other rates, must be constructed *on a mileage basis*.

If Summerville is entitled to have its rates constructed on a mileage basis, neither the Commission nor the Court has the right to "ignore its natural advantage," in being the shorter distance point.

But if it be held that Summerville is entitled to have its rates constructed on a mileage basis, every other city and station in the United States has the same right; and all rates in this country must be constructed on that basis.

Neither the Commission, nor the Court, has any more power than a railroad, to subject Summerville to any unjust prejudice ; and if it is entitled to have rates constructed on a mileage basis, the Commission and the Court, as well as the railroads, should say so, and not " ignore its natural advantage " by subjecting it to rates *as high* as those to Charleston.

When counsel contends that the privilege given the carriers to charge to Summerville rates as high as those to Charleston, " is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case," he concedes that a dissimilarity of conditions *has* resulted from that competition ; and yet he fails to explain why it would be a reasonable allowance for that dissimilarity to permit the carriers to charge to Summerville rates *exactly as high* as those to Charleston, and yet not one cent higher. It is quite easy to make such assertions, but quite impossible to suggest any intelligible reason in support of them.

In Section XXXIV of this argument I showed that it is practically impossible to construct rates upon any " scale of comparison between the dissimilarity of conditions and the disparity of rates ;" and it is equally impossible to affirm, with any basis of reason to support it, that a certain relation of rates constitutes " a reasonable allowance for dissimilarity of conditions resulting from competition."

It is easy enough to make the *assertion* that a certain relation of rates constitutes " a reasonable allowance for dissimilarity of conditions resulting from competition ;" but such an assertion, if made by a quasi judicial tribunal, should be supported by some good reason.

The legislative department has the power to arbitrarily declare that any particular relation of rates shall *be deemed* to be reasonable ; whether it be reasonable in fact, or not—provided it does not amount to confiscation of the carrier's property.

Congress has the power to arbitrarily declare that all interstate rates shall be made upon a mileage basis ; though it may not be able to assign a reason for doing so.

So, Congress has the power to arbitrarily declare that under no circumstances or conditions, shall a greater charge be made for a shorter, than for a longer distance; though it may not be able to assign a reason for its action.

But when a quasi judicial tribunal declares that all interstate rates shall be made upon a mileage basis; or that under no circumstances or conditions shall a greater charge be made for a shorter than for a longer distance, it must be able to show *that rates made otherwise than as directed by the tribunal, violate some provision of the Act to Regulate Commerce.*

Congress has the power to arbitrarily declare that the rates to Summerville shall be not higher than the rates to Charleston; and it may do so without being able to assign any reason for its action. But before this Court can be asked to judicially declare that the privilege given the carriers to make the rates to Summerville *as high* as to Charleston "is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case," the Court must be furnished by counsel with some good reason to support the declaration.

Every reason that can be assigned to show that the Summerville rates should not be higher than the Charleston rates, can be assigned to show that the Summerville rates should be lower than the Charleston rates; and lower in the exact proportion that the Summerville mileage is less than the Charleston mileage.

But as such a course of reasoning would lead to the requirement of mileage rates all over the country, this Court is not asked by counsel to follow the reasoning to its inevitable conclusion.

LXVI.

THE CASE OF UNION PACIFIC CO. VS. GOODRICH.

Counsel for the appellee may refer to a statement in the opinion of this Court in the case of Union Pacific Co. vs.

Goodrich, 149 U. S., p. 680, to the effect that the Act to Regulate Commerce was designed to "cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, and favored corporations."

The word "rebates" as used by the Court manifestly refers to "special rebates" mentioned in section 2 of the Act to Regulate Commerce, and which are prohibited only when they are given to one person, and refused to another, where the service to both is rendered under substantially similar circumstances and conditions.

The word "discriminations" as used by the Court manifestly refers to "*unjust* discriminations" mentioned in said section; because this Court has held that the act prohibits only such discriminations or preferences "as are *unjust* and *unreasonable*."

145 U. S., pp. 276, 277, I. C. C. vs. B. & O. R.R.

LXVII.

THE ORDER MADE BY THE COMMISSION IN THIS CASE IS NOT
LAWFUL UNDER THE SECOND SECTION OF THE ACT.

The second section of the Act to Regulate Commerce is:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust

discrimination, which is hereby prohibited and declared to be unlawful."

24 U. S. Stat. at Large, pp. 379, 380.

The second section was construed by this Court, in *Wight vs. U. S.*, 167 U. S., pp. 516-518. In that case, a railroad company charged one shipper a higher rate than another shipper for the carriage of beer from the same place of shipment (Cincinnati) to the same place of destination (Pittsburg). The Court held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition. The Court said that it was the purpose of the second section to enforce equality between shippers, and to prohibit "any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor."

As Summerville and Charleston are not the same distance from Memphis, the second section has no application.

LXVIII.

THE ORDER MADE BY THE COMMISSION IN THIS CASE IS NOT LAWFUL UNDER THE FIRST SECTION OF THE ACT.

The first section enacts that all charges "shall be reasonable and just."

24 U. S. Stat. at Large, p. 279.

Mr. Justice Brown, in delivering the opinion of this Court, in the case of *I. C. C. vs. B. & O. R. R.*, said:

"That a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination, or an unreasonable preference, under sections 2 and 3."

145 U. S., 277, *I. C. C. vs. B. & O. R. R.*

81 Fed. Rep., p. 804, *Kilnavey vs. Terminal R. Assn.*

I have shown in Section LXVII of this argument that the second section has no application ; and I have shown in Sections XLIV to LXVI that the disparity in rates in this case does not constitute an unreasonable preference under Section 3. I shall therefore now consider the question as to whether there is sufficient evidence in the record in this case to justify this Court in decreeing that the rates to Summerville are not reasonable within the purview of the first section of the Act.

In the case of Ames vs. U. P. Ry. Co., Mr. Justice Brewer used this language :

“ But the grave question still remains, are the rates prescribed in this Act as the maximum over which the railroad companies may not go, unreasonable, and so unreasonable as to justify the court in staying its operation? *No more difficult problem can be presented than this.* There are so many matters which enter into it, and which must be taken into consideration, before a satisfactory answer can be reached.”

64 Fed. Rep., 173, Ames vs. U. P. Ry. Co.

In the same case, reported under the style of Smyth et al. vs. Ames (known as the “Nebraska Freight Rate Case”), this Court said : “ How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question.”

169 U. S., p. 546.

In the case of U. S. vs. Freight Association, 166 U. S., p. 331, Mr. Justice Peckham used this language :

“ What is a proper standard by which to judge the fact of reasonable rates ? Must the rates be so high as to enable the return *for the whole business* done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment ? If so, *what is a fair and reasonable profit ?* That depends sometimes upon *the risk incurred*, and the rate itself differs in different localities ; which is the one to which reference is to be made as the standard ? Or is the reasonableness of the profit to be limited to *a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended ?* Or is still another standard to be

created, and the reasonableness of the charges tried by *the cost of the carriage of the article, and a reasonable profit allowed on that?* And in such case would *contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc.,* be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the *charges for the transportation of the same kind of property made by other roads similarly situated?* If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation."

The italics are mine.

166 U. S., pp. 331, 332.

See also 81 Fed. Rep., pp. 551, 552, Van Patten vs. C. M. & St. P. Ry. Co.

In the case of Smyth et al. vs. Ames et al., Mr. Justice Harlan said :

"We hold, however, that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be *the fair value* of the property being used by it for the convenience of the public. And in order to ascertain that value, the *original cost of construction*, the amount expended in *permanent improvements*, the *amount and value of its bonds and stock*, the *present*, as compared with the *original, cost of construction*, the probable *earning capacity* of the property under particular rates prescribed by statute, and the sum required to meet *operating expenses*, are all matters for consideration, and are given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. vs. Ames et al., 169 U. S., pp. 546, 547.

In the cases which have involved the question as to the *reasonableness* of rates, "labyrinths of tables, figures, and esti-

mates," were presented in the testimony, discussed by counsel in their briefs, and considered by the Courts with the closest scrutiny and greatest patience, as will be seen by reference to the opinions in :

64 Fed. Rep., pp. 179 to 194, Ames vs. U. P. Ry. Co.

78 Fed. Rep., pp. 263-275, Southern Pacific Co. vs. Board of R.R. Comrs.

154 U. S., pp. 402-413, Reagan vs. Farmers' Loan & Trust Co.

169 U. S., p. 466, Smyth et al. vs. Ames et al.

In the case at bar, there will not be found in the testimony any sufficient evidence of the various and numerous facts suggested by Justices Peckham and Harlan as proper to be considered in determining what are reasonable rates. Nor will there be found any sufficient evidence of the various and numerous facts that were actually considered by the courts in determining what were reasonable rates in the cases cited above.

I submit, therefore, that the evidence is wholly insufficient to enable this Court to intelligently decide that the rates to Summerville are unreasonably high in and of themselves.

The Commission did not decide that the rates to Summerville were unreasonably high. On the contrary, it based its decision entirely upon the fourth section; and treated the matter of "*unreasonable*" rates as irrelevant.

Trans., p. 20.

LXIX.

THE BURDEN IS ON THE APPELLEE TO PROVE THAT THE SUMMERVILLE RATES ARE UNREASONABLE.

In the case of Harding vs. C. St. P. M. & O. R. Co., decided in 1887, which was one of the earliest cases decided by the Commission, the Commission held that "on a petition charging the exaction of *unreasonable* rates, *the burden of proof is on the petitioner* to sustain the charges by evidence which shows, with reasonable certainty that they are in substance true."

See 1 I. C. Rep., p. 375.

In the case of *Brewer & Hauleiter vs. Louisville & Nashville R.R. Co.*, decided in 1897, and which is one of the latest cases decided by the Commission, the Commission reiterated the doctrine that the burden of proving that a rate is in and of itself *unreasonable* is upon the complainant.

See 7 I. C. Rep., p. 234.

LXX.

A RAILROAD COMPANY IS ENTITLED TO A FAIR RETURN UPON THE VALUE OF THAT WHICH IT EMPLOYS FOR THE PUBLIC CONVENIENCE.

In the case of *Ames vs. U. P. Ry. Co.*, Mr. Justice Brewer said :

“The foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable ; and when the strong arm of the Legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property, thus invested. It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value.”

64 Fed. Rep., 176, 177, *Ames vs. U. P. Ry. Co.*

“Justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others.”

154 U. S. 412, *Reagan vs. Farmers' L. & T. Co.*

“What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.”

Smyth et al. vs. Ames et al., 169 U. S., p. 547.

I have shown in Section XXI of this argument that for the year ending June 30th, 1892, there was an actual deficit of \$58,479.55 *in the operation* of the S. C. & Ga. R.R.

So far from that company receiving “a fair return upon the value of that which it employs for the public convenience,” it actually paid \$58,479.55 for the privilege of serving the public.

While the order of the Commission is technically confined to a reduction of the rates on hay and other commodities from Memphis to Summerville, the practical effect of the order is to require the S. C. & Ga. R.R. to reduce all of its local rates, to and from all of its local stations, so that they shall, in no case, exceed the proportions which that railroad receives from through rates charged upon freight traffic passing over its road.

I have shown in Section XXI of this argument that such a reduction would amount to an annual loss of \$206,584.68 on the freight traffic *alone*; that it would increase the annual deficit to \$265,064.23; and that it would practically ruin the company.

LXXI.

THE SCHEDULE MUST BE CONSIDERED AS A WHOLE.

In order to ascertain whether a railroad company has, during any given period, received any compensation for the use of its property, it is necessary to know the results of its operations *as a whole*. The result of its operations as to any particular article, as hay, coal, pig iron, etc., is of no value; because, though it may have carried those articles at or even under cost, other articles carried by it may have yielded more than a reasonable profit.

And so, though it may have carried some articles at rates which, looked at by themselves, would appear to be excessive, yet when considered in connection with low rates charged on other articles, the volume of traffic carried by it, taken as a whole, may be found to be insufficient to yield a fair return upon the value of the road.

In the case of the Chicago & N. W. Ry. Co. vs. Dey, Mr. Justice Brewer said :

"Coming now to the question of the schedule as presented, I remark that the schedule, *as a whole*, must control, and its validity or invalidity *does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation.*"

35 Fed. Rep., p. 881, C. & N. W. Ry. Co. vs. Dey.

In the case of Chicago, etc., Ry. Co. vs. Minnesota, Mr. Justice Miller, in a concurring opinion, said :

"That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its Commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fares as excessive, or establishing its right to collect the rate as being within the limit of a just compensation for the service rendered."

"That until this is done, *it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the question which ought to be settled in this general and conclusive method.*"

134 U. S., p. 460, Chicago, etc., Ry. Co. vs. Minnesota.

In its Eleventh Annual Report, the Commission states that the classifications now in use in this country embrace from 5,000 to 7,000 items.

11 Ann. Rep., I. C. C. (1897), p. 66.

How would it be possible for any tribunal to ascertain what would be a reasonable rate upon one of those items ; as for instance, hay, coal, or pig iron, without taking into consideration any of the remaining five or seven thousand articles ?

In the case at bar, the Court is asked to decide what is a reasonable rate from Memphis to Summerville, on hay, and "other commodities," without even specifying what the "other commodities" are.

It is evident that the S. C. & Ga. R. R. carries a certain amount of traffic that originates elsewhere than at Memphis ; and that it carries a certain amount of traffic that is not destined to Summerville.

And yet, the Court is asked to single out the hay, and "other commodities" destined to Summerville alone, from Memphis alone, and to decide what are reasonable rates on said hay and "other commodities," without regard to what may have been the results of the operations of the S. C. & Ga. R. R. under its schedule taken "as a whole."

LXXII.

IT IS NOT FAIR TO COMPARE COMPETITIVE RATES WITH NON-COMPETITIVE RATES.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens said :

"Nevertheless, a reference to the Memphis rate is of value in determining whether the rates to Chattanooga are reasonable rates, it appearing that, though the distance is nearly one-third greater than to Chattanooga from the East, rates are accepted for the Memphis business, considerably less than those at Chattanooga."

85 Fed. Rep., pp. 111, 112.

In that case Memphis was one of the longer distance points, and Chattanooga was the shorter distance point. The Com-

mission held, in that case, that the water competition at Memphis was such as to create dissimilar circumstances and conditions, and therefore that in charging less to Memphis than to Chattanooga, the carriers did not violate the fourth section of the Act. But, though the Commission declined to grant relief to Chattanooga as against Memphis, under the *fourth* section, yet according to Judge Severens, the Commission could and should have used the Memphis rate as evidence under the *first* section, that the shorter distance rates to Chattanooga were unjust and unreasonable.

In other words, his Honor held that it is fair to compare competitive rates with non-competitive rates, in order to test the reasonableness of the latter.

In order that his Honor's argument may be placed fully and fairly before the Court, I make the following additional quotations:

"The question whether the rates are just and reasonable in themselves is in some measure a relative one, that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a *similar* service, etc." . . .

"It seems to me clear, that the charges accepted for the longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul."

85 Fed. Rep., p. 114.

"Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, for the presumption would always be that the compensation charged for the service is sufficient to be reasonable."

85 Fed. Rep., p. 115.

"If, as I gather from the testimony, the through rates to Nashville (another of the longer distance points in that case) afford a fair profit to the carrier, whether the Northern Trunk Lines or the Respondents (and it is reasonable to suppose they would not engage in the business without it), there is substantial ground for contending that the same charge for carrying

freight from the East to Chattanooga would afford a reasonable profit, and would therefore be a reasonable charge."

85 Fed. Rep., p. 115.

The majority of the Court of Appeals in the case at bar took the same view as Judge Severens, and said :

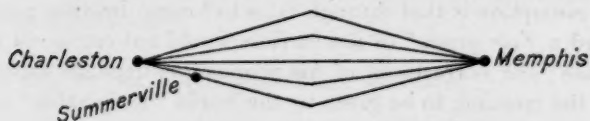
"The rate from Memphis to Charleston on hay and grain, and like products, is reasonable, and is shown by the evidence to be remunerative; it is fair to presume that it would not have been made by the railroad, unless those controlling it were satisfied that it would be so," etc.

Trans., p. 132.

It will be noticed that the argument, which runs through the opinion of Judge Severens, as well as the opinion of the majority of the Court of Appeals in the case at bar, is :

First: That it is fair to presume that the carriers would not accept the rates which they do accept on longer distance competitive traffic, unless such rates were reasonably remunerative; and

Second: That whatever rates to the longer distance points are reasonably remunerative, the same rates to the shorter distance points must, *a fortiori*, be reasonably remunerative.



The above diagram represents five competing lines, extending from Memphis to Charleston. The competition between said lines would naturally be severe and very effective. It would necessarily result in very low rates. And the rates would be remunerative only in the sense that they yield a slight profit over the additional cost of carrying that particular traffic.

Such rates might be called reasonably remunerative for com-

petitive traffic; because, as is well known, competitive rates do not generally yield more than a slight profit over the additional cost of the movement of competitive traffic. But the fact that such rates may be reasonably remunerative for the competitive traffic passing between Memphis and Charleston is no evidence that they are reasonably remunerative for the non-competitive traffic passing between Memphis and Summerville.

Suppose it should be shown that merchants are constantly in the habit of selling salt, domestics and other staple articles at one per cent. profit. It would be perfectly fair to compare the rates charged by one merchant upon *those* articles with the rates charged by another merchant *in the same town* upon the *same articles*; for it would be right to assume that if, for any reason, one merchant could afford to sell those articles at a certain profit, another merchant in the same town could afford to sell at the same profit; and the fact that the profits of both merchants on those articles were controlled by competition would not alter the case. But would it be fair to compare the profit which those merchants accepted on salt, domestics, etc., with their profit on fancy imported articles, and foreign dress goods? *In a word, it is fair to compare competitive rates with competitive rates; and it is fair to compare non-competitive rates with non-competitive rates; but it is not fair to compare competitive rates with non-competitive rates.*

When Judge Severens says that: "The presumption would always be that the compensation charged for the service or thing is sufficient to be *reasonable*;" and when he says that the presumption is that through rates to longer distance points "afford a *fair* profit" or the carriers would not engage in the business; the correctness of his proposition depends entirely upon the meaning to be given to the words "reasonable" and "fair."

It may be said that a profit of one per cent. on salt, domestics and other staple articles is a "reasonable" and "fair" profit on those articles, or merchants "would not engage in the business." And the profit *is* in fact "fair" and "reasonable;" *provided the merchant be allowed to charge higher profits upon fancy imported articles, dress goods, etc.* A merchant is compelled to carry certain staple articles in stock in order to draw customers for his higher priced goods; and he can "fairly"

and "reasonably" accept extremely low rates of profit upon his staple goods, rather than deplete his stock of such articles, and thereby drive away his custom. But if by the words "fair" and "reasonable," Judge Severens means that because a merchant accepts one per cent. profit upon staple articles, the presumption is that it is a fair and reasonable profit to be charged *upon all other articles sold by him*; and that he ought not to be allowed to exceed that profit upon any other article; then I respectfully dissent from his proposition. Any such rule of law administered in a case where a merchant was suing for articles sold and delivered, and no price had been previously stipulated, would destroy the mercantile business of this country. No court would think of charging a jury in a suit brought by a merchant to recover for the value of an imported lace shawl sold by him, that the jurors must, in ascertaining its value, restrict the merchant to the same rate of profit upon the shawl, as that which he accepts on domestics and other staple articles.

LXXIII.

THERE IS NO SUCH PRESUMPTION AS THAT COMPETITIVE RATES
ARE REASONABLY HIGH.

The proposition of Judge Severens, and of the majority of the Court of Appeals, referred to in the last preceding section of this argument, is plausible, and apparently logical, but in reality sophistical.

It may be put in syllogistic form, as follows :

1. Rates charged by a carrier to a longer distance point must be reasonably high, or they would not be accepted.
2. The rates charged by the appellants to the shorter distance point in this case are higher than the rates charged by them to the longer distance point.
3. Therefore, the rates charged by them to the shorter distance point are *unreasonably* high.

The fault in the syllogism is to be found in the major premise. And it consists in stating a fact as being true under all circumstances, which, though it may be true under certain circumstances, is not true under other circumstances, and is not true under the circumstances of the particular case, in which the syllogism is invoked.

A similarly faulty syllogism would be the following :

1. Men are black.
2. George Washington was a man.
3. Therefore George Washington was black.

If a railroad has no competition to contend with, its own interests will induce it to charge according to distance.

In that case, rates charged by it to a longer distance point may properly be presumed to be reasonably high ; and in that case, the major premise of the syllogism would be true.

But where severe competition exists at the longer distance point, whether the competition be between market and market, or between product and product, or between carrier and carrier, the presumption instead of being that the rates to that point are reasonably *high*, is that they are lower than might be reasonably charged, were it not for such competition.

In the case of *Smyth et al. vs. Ames et al.*, this Court quoted the following from Mr. Justice Brewer :

"It must be remembered that these roads are competing roads ; *that competition tends to a reduction of rates—sometimes as the history of the country has shown, below that which affords any remuneration to those who own the property.*"

Smyth et al. vs. Ames et al., 169 U. S., p. 542.

In its Eleventh Annual Report, the Commission says :

"Rates to competing and distributing centers are not for the most part unreasonably high ; they are frequently *quite low*."

11 Ann. Rep., I. C. C. (1897), p. 14.

LXXIV.

IF COMPETITIVE RATES ARE TO BE USED AS A STANDARD FOR
FIXING NON-COMPETITIVE RATES, THE RATES ON LOW-
CLASS TRAFFIC WILL HAVE TO BE USED AS A
STANDARD FOR FIXING RATES ON
HIGH-CLASS TRAFFIC.

To illustrate my meaning :

By reference to the tariff of the Erie & Western Transportation Co., Trans., p. 103, it will be seen that the lake and rail first-class rate from Chicago to Boston is 67 cents per hundred pounds, while the fifth-class rate is only 23 cents per hundred pounds.

Now, if the low competitive rates from Memphis to Charleston are to be used as a standard for fixing rates to the non-competitive stations on the S. C. & Ga. R.R., why is it that the low rate from Chicago to Boston on 5th class freight is not to be used as a standard for fixing the rates from Chicago to Boston on the first four classes of freight? Why cannot the argument be made, that if transportation companies have, for a long series of years, carried traffic, known as 5th class, from Chicago to Boston for 23 cents per hundred pounds, the presumption is that it has afforded them "a fair profit," or "they would not engage in the business;" and if 23 cents per hundred pounds affords "a fair profit" for carrying 5th class freight from Chicago to Boston, the higher rates charged by them from Chicago to Boston upon the first four classes of freight must be unreasonably high? And yet, if any one should seriously contend that the carriers of this country ought to be compelled to charge on the lower classes of traffic as high rates as are charged on the higher classes, the contention would be regarded as preposterous.

It is certain, however, that precisely the same fact which compels carriers to accept exceedingly low rates between *all* points on the *lower* classes of traffic, compels them to accept

exceedingly low rates between *competitive* points on *all* classes of traffic; and the sole compelling fact in both cases is competition. The reason why low-class traffic can only pay very low rates is because of competition between *product and product*. Wheat shipped from the Northwest to Boston comes into competition with wheat grown nearer the sea-coast; and therefore wheat from the Northwest must be carried at a sufficiently low rate to enable it to compete in Boston with wheat that is grown nearer to Boston. Again, if the rate charged upon wheat, added to its cost at the place of production, makes the selling price of wheat in Boston too high, as compared with corn, rye, etc., the amount of wheat consumed at Boston will diminish, and the deficit will be made up from corn, rye or other grain. In a word, the only reason why exceedingly low rates are charged upon the lower classes of traffic is that *competition between product and product* compels it; the only reason why rates to Charleston on all the classes are less than rates to the local stations on the S. C. & Ga. R.R. is that competition between carrier and carrier, and between market and market, which exists at Charleston, but does not exist at said local stations, compels it. If competition is to have the effect to raise competitive rates to the level of local rates, it should also have the effect to raise the rates on low-class traffic, to the level of high-class rates.

LXXV.

IF RATES TO LONGER DISTANCE POINTS PAY ANYTHING OVER THE
ADDITIONAL COST OF THE MOVEMENT OF THE LONG DIS-
TANCE TRAFFIC, THERE IS NO "LOSS" TO BE
MADE UP ON THE LOCAL TRAFFIC.

I have heretofore commented upon the proposition that the presumption is that rates charged by carriers to longer distance points yield a reasonable profit, and therefore that higher rates charged to shorter distance points must yield an unreasonably high profit.

Counsel for the appellee may contend for another proposition, which Judge Severens apparently approved, and which is

entirely different from, and inconsistent with, the proposition upon which I have heretofore commented.

The other proposition may be put in syllogistic form as follows:

1. Rates charged to longer distance competitive points do *not* yield reasonable compensation for the service performed by the carrier.
2. The loss sustained by the carrier on traffic to longer distance competitive points is made up by increasing the rates to shorter distance points.
3. Therefore carriers ought not to be allowed to charge less for a longer than for a shorter distance over the same line, in the same direction, etc.

The first fault in this syllogism is to be found in the major premise; and it is the fault of indefiniteness. How are we to decide what is a "*reasonable*" compensation for transportation to a *competitive* point?

My contention is, that if *competitive* rates pay anything over and above the *additional cost of movement* of the competitive traffic, it is right and *reasonable* that they be accepted by the carrier; rather than abandon the competitive traffic.

On the other hand, counsel for the appellee may contend that *competitive* rates ought to be sufficient to pay not only the *additional cost of movement* of the competitive traffic, but also the proportion of "operating expenses," "fixed charges," etc., which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier.

Such proposed method of rate construction is correct in theory; and it would be followed by every railroad traffic manager in the country, if it were practicable to do so. But the utter impracticability of constructing rates upon the theory contended for by counsel was demonstrated by the Commission itself in 1887, In re Southern Railway & Steamship Association (sometimes cited as In re Louisville & Nashville Railroad Co.). In that case the Commission said:

"This distinction between *the cost of movement* and the *fixed charges* often becomes of importance in such cases as that of the lumber trade just mentioned. That trade is new ; the roads which take it were built without anticipating its springing up, and their managers made their calculation for business to meet the whole cost of operation in reliance upon such traffic as was then apparent or probable. The *fixed charges* of the road may, for purposes of illustration, be assumed to equal one-half of the whole, *the cost of movement* of freight the other half. The rates laid were doubtless calculated to cover the whole, with a margin for profit, and were so laid that all traffic would contribute toward both *fixed charges* and *cost of movement*. But now comes this new business, and from the nature of the case low rates are a necessity to it ; it can pay perhaps little if anything more than half what is paid by other traffic. But taking it will not increase perceptibly *the fixed charges* of the road because those are made up of the items that must be paid whether the traffic is large or small. What is added to the cost by taking it is *simply the expense of its own handling and movement* ; and upon the supposition made, there might perhaps be gain to the road instead of loss, in taking it at anything above half the rates which are levied upon other traffic *corresponding to its classification*. It might, therefore, be carried at such rates without wrong to any one."

1 Interstate Commerce Rep., p. 284, right col., In Re Southern Ry. & S. S. Association.

What is said by the Commission with reference to the lumber trade, is equally applicable to all the lower kinds of freight, such as iron ore, stone, sand, brick, cement, pig iron, etc. If the courts once hold that each and every kind of traffic must be charged such rates as will pay not only the "additional expense incurred" by the carrier in the transportation of that particular kind, but also the full proportion which such traffic ought to contribute toward all the operating expenses, and fixed charges of the carrier, then the courts will put an absolute embargo upon more than half of the tonnage now carried by the railroads of this country.

The Commission in its First Annual Report to Congress said :

"It was very early in the history of railroads perceived that if these agencies of commerce were to accomplish the greatest practicable good, the charges for the transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally, for this, if the apportionment of cost were possible, would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value. On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added."

See First Annual Report Interstate Commerce Commission (1887), p. 30.

What is said by the Commission with reference to the impracticability of apportioning the charges for the transportation of different articles of freight among such articles by reference to the cost of transporting them, severally, is equally applicable to the theory that the charges for the transportation of competitive and non-competitive freight ought to be apportioned between them by reference to the cost of transporting them, severally. The reason why low-grade traffic cannot be made to pay in proportion to the cost of its transportation, is, as the Commission properly states, because the charge for carriage would be greater than it could bear. And the reason why competitive traffic cannot be made to pay in proportion to the cost of transporting it, is, because the charge for carriage upon that basis by the longer line would ordinarily be greater than by the shorter line; the longer line would be driven out of competition; the shorter line would secure a monopoly; and all competition would be destroyed.

The second fault in the syllogism referred to above in this section is to be found in the minor premise. In that premise it is erroneously assumed that a *loss* is sustained by the carrier on traffic to longer distance competitive points. But if competitive rates pay anything over and above the additional

cost of movement, so far from there being any *loss* to carriers on traffic to the longer distance points, there is a "*margin of profit*" in carrying that traffic to longer distance points. In other words, *there is no loss at all*. The real ground of objection is, that the margin of profit is not as great as it should be. The answer to the objection is, that if there is no *loss* upon the traffic carried to longer distance points, the carriage of that traffic has no tendency whatever to increase the rates to the shorter distance points. On the contrary, the profit, however small it may be, which the carriers may derive from the longer distance traffic, enables them to improve and increase their facilities for handling the shorter distance traffic, as well as the other traffic on their lines.

The third and greatest fault in said syllogism is to be found in the conclusion which is sought to be drawn from the major and minor premises.

If it were true that rates charged to longer distance competitive points do not yield proper compensation; and if it were true that their failure to do so causes a loss which the carrier tries to make up, by increasing the rates to the shorter distance points, it is manifest that if the rates to the shorter distance points be reduced to the same as the rates to the longer distance points, the loss to the carrier will be increased instead of being diminished. In other words, if the Courts compel carriers in the Southern territory to accept to all of their stations, rates as low as those which competition compels them to accept to the longer distance competitive points, the result must be the universal bankruptcy of the Southern railway system.

LXXVI.

RAILROAD OFFICIALS DO NOT "HAVE EVERYTHING THEIR OWN WAY." THEIR RATES ARE MADE FOR THEM BY COMPETITION.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says :

"But it is to be remembered that the railroad business of the country is conducted by able men, animated, as it is right to suppose, with the desire to promote the interests of those whom they serve. Further to promote the efficiency of their work, the officers of the various companies have their associations for the purpose of comparing, studying and adjusting the rates of traffic on their several lines. *In the absence of the other party, they have everything their own way.* It would be expecting something not encountered or expected in other branches of business if we anticipated that they would assume a judicial attitude toward those with whom their business is to be done."

85 Fed. Rep., p. 112.

Judge Severens is correct in saying that railroad traffic managers are animated with the desire to promote the interests of those whom they serve. But experience has taught them that the most effective way to promote those interests is to promote the interests of the patrons of their roads. This is not attributing to railroad officials any charitable or benevolent motive. On the contrary, it is conceding that they are intelligently selfish.

The error of Judge Severens consists in the statement that railroad traffic managers in studying and adjusting the rates of traffic on their several lines act "in the absence of the other party," and that "they have everything their own way." The error is quite a popular one, and it grows out of a want of familiarity with the practical method of rate-making in this country. *At the present day it cannot be said that railroad traffic managers make their rates at all.*

So far as rates to and from *competitive* points are concerned, they are fixed inexorably, and absolutely, by competition. A traffic manager has nothing to do but to ascertain the rates which his rivals are offering to accept, and adopt, or closely approximate those rates, or abandon the competitive traffic.

As to rates to and from local stations, a railroad traffic manager in many of the States, is restricted by State railroad commissioners; in every State he is restricted by competition between product and product, and between market and market;

which kinds of competition have a controlling influence upon the rates that can be charged to and from even the most strictly local stations, on a road. To illustrate: Cotton is raised on the lines of the Georgia R. R. and the S. C. & Ga. R. R., and it is shipped from many of the local stations on those roads. But that cotton is raised and shipped in competition with cotton raised upon other railroads in Georgia and South Carolina; and in competition with cotton raised upon railroads in other States. The traffic managers of the Georgia R. R. and the S. C. & Ga. R. R. must accept such rates on cotton from their local stations as will enable that cotton to be carried and sold in the markets of the world in competition with cotton raised upon the lines of other railroads in Georgia, South Carolina, and other States, or the cotton cannot be moved at all. In that event the Georgia R. R. and the S. C. & Ga. R. R., will lose the revenue that they might otherwise realize from the transportation of cotton from their local stations.

Again: If the cost of producing cotton, added to a certain rate charged for transportation, exceeds the price which can be obtained for cotton in the market, the cotton will not move from the local stations; and said railroads will lose the revenue which they might otherwise realize from its transportation. It is necessary, therefore, that the traffic manager acquaint himself, not only with the rates which other railroads are accepting for the transportation of cotton for similar distances, but also with the cost of producing cotton, and with the price at which it is selling; and this he cannot do without full consultation with the farmer who raised the cotton, and the merchant who buys it. The same is equally true of corn, wheat, and other grain, of live stock, and, in fact, of everything produced along the line of a railroad and shipped from its local stations. Whenever any of those products are offered for shipment at a local station, they are offered with a full knowledge that their transportation must be conducted in competition with the transportation by other railroads of similar products, destined to common or competing markets; and such competition is as controlling, though not in the same degree, as that which exists at those cities where numerous rival lines of transportation intersect.

The Commission, in speaking of classifications made by railroad associations, says:

"But in these associations, when in session for the making of rates, each railroad official has, to some extent, had the district which was served by his road behind him; he has felt the pressure of the interests there, and contended for them as against the interests in classification represented by others, not only because it was desirable that the roads should favor the policy its patrons favored, but also *because the same policy was likely to be beneficial to both.*

"The result necessarily is that a classification made by a railroad association represents a series of compromises, *to which not only the railroads are parties, but in a certain sense business interests and sections of country also; these in many cases being admitted by their representatives to the consultations upon a subject so vitally concerning their interests, and allowed to present their views.*"

1 Ann. Rep., I. C. C. (1887), p. 31.

In an extract from Senate Report No. 1394, Finance Committee, second session, Fifty-third Congress, published by the Government under the title "Wholesale Prices, Wages and Transportation," it is said that:

"These are the general rules under which classifications are constructed, and while to a large extent controlling, classifications are, notwithstanding, in a great measure a series of compromises, *the participants of which are not alone the railroads, but also the shippers and representatives of business interests throughout the country, the latter being afforded ample opportunity to join with the railroads in the discussion as to the proper classification of articles of shipment affecting their interests.*"

Wholesale Prices, Wages and Transportation, p. 404.

Judge Severens is therefore in error, when he states that traffic officers, in "studying and adjusting the rates of traffic on their several lines," act "in the absence of the other party and have everything their own way."

LXXVII.

RAILROADS DO NOT, AND CANNOT "EVEN UP THEIR PROFITS" BY
INCREASING LOCAL RATES.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says :

"If railway carriers engage in a competitive struggle for business at a place where they meet and underbid each other, or other carriers, to a point which is not in itself remunerative, can they turn back on the line, and taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition, or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul as shall make good their lack of profit in competitive business, and even up the profits on their whole business to the point they set before themselves as reasonable? To the proposition thus roundly stated, no doubt counsel for the carriers would say that they could not contend for it, and yet this is the result reached by the not very indirect steps of the argument."

85 Fed. Rep., p. 115.

I respectfully deny that the argument of "counsel for the carriers" either directly or indirectly leads to any such proposition as the Judge stated so "roundly."

I have heretofore stated what I regarded as the reasonable limitations imposed upon carriers in exercising the privilege of taking into consideration competition as one of the circumstances and conditions affecting transportation; and one of the limitations conceded by me was that the rates accepted by carriers on traffic to the longer distance competitive point *must yield some profit* (though it may be very small) over the additional cost of the movement of that traffic. The limitation is directly opposed to the idea that carriers may "engage in a competitive struggle" . . . "to a point which is not in itself remunerative." If the rates accepted to the longer distance competi-

tive points yield *any* profit over *the additional cost of the movement of that traffic*, they are "remunerative" to some extent, though the remuneration may be very slight.

Another limitation heretofore conceded by me, is that the rates charged by carriers to the shorter distance point must not be unjust or unreasonable, within the purview of the first section of the Act. If it be necessary that those rates be just and reasonable, within the purview of that section, it is impossible for the carriers "to turn back on the line" and "take advantage" of the conditions existing at such points. If the rates to the shorter distance points be in fact just and reasonable, the carriers, in charging them, are in no sense "taking advantage" of the persons who pay them. If the rates charged by the carriers to the longer distance competitive points are remunerative to any extent, however small it may be, there is no "loss" sustained by the carriers in the transportation of the longer distance traffic; and therefore there is no occasion for them to "even up," by increasing their shorter distance rates.

If Judge Severens means that railroads must charge at competitive points, the same rate of profit as is charged at non-competitive points, then they must abandon competitive traffic altogether. If he means that railroads must accept upon non-competitive traffic whatever rate of profit they may be forced to accept upon competitive traffic, then the Southern railroads must go into bankruptcy; because they can no more afford to carry all of their traffic at the low rate of profit which they are forced to accept at competitive points, than a merchant can afford to sell his entire line of goods at the same rate of profit which he is forced to accept upon certain staple articles.

LXXVIII.

THE POWER OF THIS COURT TO MODIFY THE ORDER MADE BY THE COMMISSION.

Counsel for appellee may contend that this Court may modify the order of the Commission, or make such new or

different order as, under the law and "the entire body of the evidence" may, in the judgment of the Court, be just and proper.

In the case of *I. C. C. vs. Detroit, G. H. & M. Ry. Co.*, it was said by Judge Severens in his dissenting opinion, as follows :

"The Court is not authorized to make any general order or decree upon the matters at large as they shall appear before it, but is given power simply to award its process if it judicially approves the order of the Commission. If it does not find it to have been warranted by law, its power and duty are at an end."

57 Fed. Rep., 1013, 1014.

He also used the following language: "But, as already said, the Court can make no new order. The order of the Commission stands or falls as made."

57 Fed. Rep., p. 1019.

See, also, 83 Fed. Rep., p. 267, *Farmers' Loan & Trust Co. vs. N. P. Ry. Co.*

The proposition thus announced by Judge Severens was affirmed by the U. S. Circuit Court of Appeals for the Sixth Circuit, in 74 Fed. Rep., p. 805. The fourteenth head-note of the opinion of that Court is as follows :

"The power given to the courts to compel obedience to the 'lawful order' of the Commission being special and statutory, is strictly limited to the power conferred; and consequently the courts can only grant or refuse compulsory obedience to the order, and have no authority to modify or change it."

74 Fed. Rep., p. 805, *D. G. H. & M. Ry. Co. vs. I. C. C.*

In the case of *I. C. C. vs. D. L. & W. R. Co. et al.*, in the Circuit Court for the Northern District of New York, Wallace, Circuit Judge, in speaking of the power of the Circuit Court, said :

"The Court cannot substitute, for an order actually made, one such as the Commission might or should have made, or

such as the Commission intended to, but failed to, make. This Court has no revisory power over the orders of the Commission. Its function in a proceeding like this is merely to inquire whether the respondents, the common carriers, have refused or neglected to perform any lawful order or requirement of the Commission. It cannot undertake to decide whether the respondents have violated one which the Commission might have lawfully made."

I. C. C. vs. D. L. & W. R. Co., 64 Fed Rep., p. 723.

Counsel for appellee may refer to the following language in the opinion of this Court in what is known as the "Social Circle case: "

"The Commission denied the power of this Court to hear the case upon any other issues, pleadings, or facts, than those presented to the Commission. It is claimed that the case is to be determined with reference to what the Interstate Commerce Commission had before it, and that no additional issues or questions should be raised, *or other evidence taken*. The language of the act of Congress does not support this contention. . . . This question may be considered, therefore, as settled, not only by the language of the act of Congress, but by authority, against the position assumed by counsel for the Commission."

I. C. C. vs. C. N. O. & T. P. Ry. Co., 56 Fed. Rep., pp. 934, 935.

In the "Social Circle case," counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the Court, was whether the Circuit Court, in its examination into the legality of an order, as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel for appellee may quote the following language from the opinion of this Court in the case of Interstate Commerce

Commission vs. Alabama Midland Ry. et al., 168 U. S., p. 175, viz:

"It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal in such cases that they *are not restricted to the evidence adduced before the Commission*, nor to a consideration merely of the power of the Commission to make the particular order under question, but that *additional evidence may be put in by either party*, and that the duty of the Court is to decide, as a Court of Equity, upon the entire body of evidence."

It is true of the "Alabama Midland case," as it is true of the "Social Circle case," that Counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in either of those cases. The question with reference to which the language above quoted was used by the Court in both cases, was, whether the Circuit Court, in its examination into the legality of an order as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel for appellee may quote the following language from the opinion of Judge Sage in *I. C. C. vs. C. N. O. & T. P. Ry. Co. et al.*, known as the "Cincinnati and Chicago Freight Bureau cases," viz:

"The Court is to sit as a court of equity, without the formal proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises. It is so provided in section 16 of the act. The intention of Congress evidently was to vest in the Court a large discretion."

64 Fed. Rep., pp. 984, 985.

In those cases, counsel for Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in those cases. The question with reference to which the language above quoted

was used by the Court, was whether the Circuit Court, in its examination into the legality of an order as made by the Commission, could consider a transcript of the testimony taken before the Commission, as a part of the record. See 64 Fed. Rep., p. 983. His Honor held that though the testimony taken before the Commission was not a part of the record, either party should be allowed to use as evidence any testimony taken before the Commission, which is competent and relevant. Such action was regarded by the Court as a proper exercise of the "large discretion" vested in it by the Act; and it was considered by the Court as doing "justice in the premises" to allow either party to use the testimony taken before the Commission, though it was not technically a part of the record. The question as to whether the Court had power to modify an order made by the Commission, or to make a new order of its own, was not discussed by counsel nor considered by the Court in those cases.

Counsel for appellee may quote the following language used by Judge Lurton in the case of Shinkle Wilson & Kreis Co. vs. L. & N. R.R. Co. et al., 62 Fed. Rep., p. 693, viz:

"If it shall then appear, on all the evidence heard and submitted, that the order of the Commission *was lawful* and reasonable, and that it has been violated, it shall be lawful for such Court to issue a writ of injunction, or other proper process, to prevent further disobedience of such order. Now, it is well settled that the Court is not the mere executioner of the orders of the Commission. The suit in this Court is an original and independent proceeding. This Court is not confined to a mere examination of the matter as heard by the Commission. It proceeds to hear the complaint *de novo*."

In that case, counsel for the complainants did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the Court, was whether the Court was bound to issue a *preliminary* injunction to compel a carrier to obey an order made by the Commission in reference to freight rates, where

the answer of the carrier denied that said rates were unreasonable or unjust, and denied the legality of said order.

Counsel for appellee may quote the following language from the opinion of this Court in the case of I. C. C. vs. Alabama Midland Ry. Co. referred to above:

“ Much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be *reviewed* by the Court. The provisions of section 16 of the Act, which authorize the Court to ‘ proceed to hear and determine *the matter* speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner *as to do justice in the premises*, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the Court may think needful, to enable it to form *a just judgment in the matter of such petition*,’ extend as well to an inquiry or proceeding *under the fourth section* as to those arising under the other sections of the Act.”

The italics are mine.

In using the language just quoted, this Court was not discussing the question as to whether the Circuit Court can modify or change an order as made by the Commission; and therefore, it had no idea of disapproving the proposition announced by Judge Severens, and affirmed by the Court of Appeals in the case of I. C. C. vs. D. G. H. & M. Ry. Co. referred to above.

In using the language just quoted from the opinion in the Alabama Midland Ry. case, the Supreme Court was merely combatting an argument which had been pressed upon that court by counsel for the Commission to the effect that *under the fourth section*, the action of the Commission was conclusive, and could not be reviewed by the courts at all. This Court decided, however, that the power of *review* by the courts extends “ as well to an inquiry or proceeding *under the fourth section*, as to those arising under the other sections of the Act.”

The power of "*review*" referred to by this Court, is confined to a "*review*" of the question as to whether the order as made by the Commission is lawful. If upon such a "*review*," the Court finds that the order is lawful, it awards its process to enforce it. If upon such "*review*," the Court finds that the order as made is not warranted by law, the power and duty of the Court are at an end.

"*The matter*" which the Court is authorized to "*hear and determine*," and "*the premises*" in which the Court is to "*do justice*," and "*the matter of such petition*" in which the Court is "*to form a just judgment*," all mean one and the same thing, viz., "*to hear and determine*," and "*to form a just judgment*" on the question whether the order *as made by the Commission, is lawful*, or not.

The sixteenth section of the Act to Regulate Commerce provides that whenever any common carrier shall refuse or neglect to perform "*any lawful order or requirement of the Commission*," the Commission, or any one else, may apply to the Circuit Court of the United States, and said court "*shall have power to hear and determine the matter*" "*speedily as a court of equity*," "*in such a manner as to do justice in the premises*." The Court may prosecute all such inquiries as may be needful to enable it "*to form a just judgment in the matter of such petition*;" and if it be made to appear to such court on such hearing or on report of any such person or persons, that the *lawful* order or requirement of said Commission drawn in question, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction," etc.

It will be seen that the jurisdiction of the Circuit Court, *under section 16*, is confined to the enforcement of a **LAWFUL** order made by the Commission; and that said court is not authorized to make a new order of its own.

I concede that the Commission may assign an erroneous reason for making an order, and yet the order may, for other reasons, be lawful; and that, in such case, it is the duty of the Court to enforce it; but I contend that the Court has no power to enforce an order of the Commission which is *not* lawful; or

to make an order of its own, under section 16, which is *substantially* different from the order made by the Commission.

Under sections 8 and 9 of the Act to Regulate Commerce, any one who complains that the Act has been violated by a common carrier is given an action for damages in the courts of the United States. But if instead of resorting to those courts, he elects to apply to the Commission, as he may do under section 16, he must be prepared to maintain the *lawfulness* of such order as the Commission may make in his behalf; or he cannot demand of the Circuit Court an enforcement of the order.

Section 9 provides that any person shall have the right to pursue his remedy in court, or his remedy before the Commission; but that he shall not have the right to pursue both remedies. According, however, to the contention of counsel for the appellee a party may elect to apply to the Commission, and having obtained an order from it he may, under section 16, apply to the Court for an enforcement of the order; and notwithstanding the Court may be of the opinion that the order of the Commission is unlawful, it is the duty of the Court to give to the party all the relief to which he would have been entitled, if he had, in the first instance, applied to the Court under sections 8 and 9 of the Act. If the contention of counsel be correct, the party, instead of being forced to elect between the Commission and the Court, obtains the advantage of the jurisdiction of the Court, as well as that of the Commission.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens did not hold that the Court had the right to "modify the order of the Commission" or to make a "new or different order" of its own. Speaking of the order made by the Commission in that case, he said:

"The legal reason given may be wrong and the order right, if, upon the facts, the latter (i. e., the order) should be found by the Court TO BE WARRANTED BY LAW. Nor would it affect the duty of the Court if the Commission had founded its order upon one provision of the Act, and the facts brought the case within some other. THE QUESTION, THEREFORE, IS WHETHER THE ORDER

MADE WAS A LAWFUL ONE *in the circumstances as they are made to appear.*"

85 Fed. Rep., p. 110.

In the case just cited, Judge Severens did not "modify the order of the Commission," nor did he make a "new or different order" of his own. On the contrary, he "ordered, adjudged, and decreed that *the order* MADE BY THE INTERSTATE COMMERCE COMMISSION be in all things affirmed and made the order of this Court," etc.

Respectfully submitted.

ED. BAXTER,
Solicitor for Appellants, as of Record.

N. 2144 46
Opp. to B. & N. R. Co. for App.
Filed Mar. 28, 1899.

U. S. SUPREME COURT
FILED
MAR 28 1899
JAMES H. McKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1898.

No. 244

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., Appellants,
v.
HENRY W. REHLER, Appellee.

APPEAL

FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

*Additional Argument of ED. BAXTER, Solicitor for Appellants,
as of Record.*



SUPREME COURT OF THE UNITED STATES

October Term, 1898.

No. 244.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., Appellants,

vs.

HENRY W. BEHLMER, Appellee.

APPEAL

FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

*Additional Argument of ED. BAXTER, Solicitor for Appellants,
as of Record.*

Since my argument was filed in this case, the United States Circuit Court of Appeals for the Fifth Circuit has decided the cases of *The Interstate Commerce Commission v. The Western & Atlantic Railroad Company, et al.*; *Same v. The Clyde Steamship Company, the Georgia Railroad, et al.*; and *Same v. The Clyde Steamship Company, The Atlanta & West Point Railroad Company, and the Western Railway of Alabama, et al.*; and I submit as an appendix to my argument in this case a copy of the Opinion of the Circuit Court of Appeals in the cases mentioned.

Respectfully submitted,

ED. BAXTER,
Solicitor for Appellants as of Record.



United States Circuit Court of Appeals,

FIFTH CIRCUIT.

NOVEMBER TERM, 1898.

No. 750.

THE INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

THE WESTERN AND ATLANTIC RAILROAD CO., ET AL., *Appellees*.

No. 751.

SAME v. THE CLYDE STEAMSHIP COMPANY, THE GEORGIA
RAILROAD, ET AL.

No. 752.

SAME v. THE CLYDE STEAMSHIP COMPANY, THE ATLANTA &
WEST POINT RAILROAD COMPANY, AND THE WESTERN
RAILWAY OF ALABAMA, ET AL.

*Appeals from the Circuit Court of the United States for
the Northern District of Georgia.*

Before PARDEE and McCORMICK, Circuit Judges, and PAR-
LANGE, District Judge.

McCORMICK, Circuit Judge, delivered the opinion of the Court.

The three above-styled causes present substantially similar questions of fact and questions of law. They were heard together in the Circuit Court and in this Court. They were severally originated by petitions filed before the Interstate Commerce Commission against the respective appellees by the Railroad Commission of Georgia. These petitions were filed on October 22, 1891.

The gravamen of the petition in the first-named of the above cases was, that the appellees charged, collected, and received for freight transportation, by continuous carriage, from the city of Cincinnati and other Ohio river points to the towns and stations of Marietta, Acworth, Cartersville, Kingston, Adairsville and Calhoun, on the Western and Atlantic Railroad, a greater amount than the amount charged and received for freight carried through the towns and stations just named to the city of Atlanta; that the rate of freight charged to the shorter distance points is unreasonable and discriminating in its nature, and is in direct violation of Section 4 of the act of Congress entitled "An act to regulate commerce," and prays that the defendants therein (appellees here) may be required to answer, and after due hearing and investigation an order may be made commanding them to cease and desist from the violations of the act to regulate commerce.

In the second suit, the same charges and prayer are made as to the rates of the defendants (appellees) from New York and other eastern cities to points on the Georgia Railroad between Augusta and Atlanta, to-wit: Greensboro, Madison, Social Circle, Covington and Stone Mountain, being the shorter-distance points in that case, and Atlanta the longer-distance point.

In the third complaint the same charges and prayer are made as to the rates of the defendants (appellees) from New York and other eastern cities to points on the Atlanta and West Point Railroad and the Western Railway of Alabama between Atlanta and Opelika, to-wit: Newnan, Grantville, Hogansville, La-Grange, and West Point being the shorter-distance points in that case, and Opelika the longer-distance point.

The Interstate Commerce Commission, after due service of these complaints on the defendants therein, and after testimony taken and argument had in behalf of all parties in interest, made its report and decision November 11, 1892, in which it

held in substance in each of the cases, that all of the carriers, as presented in the cases, are subject to the act to regulate commerce, and to the jurisdiction of the Interstate Commerce Commission as to through shipments from Cincinnati, New York, Philadelphia, Boston and Baltimore; or from any Ohio river or Mississippi river point, or any Atlantic port north of Charleston, and that they had no right to put in the higher rate for the shorter-distance, upon their own motion, but should have made application to the Commission for relief under the provisory clause of the fourth section; and are technically not now entitled to make defense to the complaints. After discussing the facts in the first case, the Commission says: "In view of these facts, and others shown in the statement of findings, we hold that the defendants are not, upon the evidence, justified in making the greater charges complained of in this case. But this being the first case since the Louisville & Nashville decision in which the Commission has been called upon to specifically hold that relieving orders must be applied for in this class of cases, we think the carriers should have an opportunity in this case of applying for relief under the proviso of the fourth section, and, if possible, of bringing forward voluntarily, as applicants instead of defendants, additional evidence that may be admissible under such a proceeding as indicated in this opinion. The order will therefore be that the defendants in this case cease and desist, within twenty days after receiving a copy thereof, from charging or receiving any greater compensation in the aggregate for the transportation of a like kind of property from Cincinnati or other points called and known as Ohio river points for the shorter distance to Calhoun, Adairsville, Kingston, Cartersville, Acworth or Marietta, than for the longer distance over the same line in the same direction to Atlanta, the shorter distance being included within the longer distance, or, that the defendants make and file with the Commission within the time above specified an application or applications, as the case may require, as provided in the proviso of the fourth section of the Act to

Regulate Commerce, for relief from the operation of that section in respect to the prohibition therein contained against charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from Cincinnati and other Ohio river points to the shorter-distance points above mentioned, than for such transportation over the same line in the same direction for the longer distance to Atlanta, and show cause within 60 days after service of the order why such application for relief should be granted; and upon such application the evidence already taken in this case may be used. In case the application for relief shall be denied the order to cease and desist shall stand, and compliance therewith will be required within twenty days after service of the order denying the application."

A substantially similar finding and order was made in each of the two other cases.

The appellees did not apply for relief as permitted by the order, and did not change their tariff or rates to the shorter or longer distance points named.

On May 27, 1893, the bills in these cases were exhibited in the Circuit Court for the Northern District of Georgia, and, by appropriate averments therein, the proceedings had before the Commission and its decision and order thereon, and the failure of the appellees to comply therewith were presented to the court, and prayer was made that such action and orders be taken as were necessary to secure a speedy hearing and determination of the matters and things stated, and that pending the proceedings a writ of injunction or other proper process, mandatory or otherwise, to restrain the defendants, their officers, servants and attorneys from further continuing in their violation of and disobedience to the order of the Commission, be granted, and that upon final hearing such injunction may be made perpetual.

The case did not come to a speedy hearing. On July 6, 1898,

a decree was entered in each case by which the relief sought was refused and the bill dismissed. From those decrees, these appeals are taken.

It is manifest from the report and opinion of the Interstate Commerce Commission that these cases were considered and decided by it as cases presenting violations of the fourth section of the act to regulate commerce. The Commission was not, therefore, called upon to find whether the respective rates in question were reasonable and just, or not. For the same reason, it was not called upon to find whether the rates charged to the shorter-distance points gave an undue or unreasonable preference or advantage to the longer-distance points, or subjected the shorter-distance points to an undue or unreasonable prejudice or disadvantage in any respect whatever. As underlying the provisions of the fourth section, the relative effect of the respective rates is more or less discussed in the report and opinion of the Commission, but it does not appear to have made, nor to have intended to be understood as making, any finding of fact in reference to these rates that would affect their relation to any section of the act to regulate commerce other than the fourth section, on which its opinion and decision proceeds and rests. Without conceding this, counsel for the appellant contended in the Circuit Court, and contends in this Court, that on applications like these the courts are not limited to a review of the grounds on which the Commission acted, but have, and should exercise, jurisdiction of the whole subject matter, and on the law and facts determine whether the tariff of rates complained of is reasonable and just or not, and whether it gives any undue or unreasonable preference to the longer-distance points, or subjects the shorter-distance points to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The appellees contend that their tariff of rates complained of does not violate the fourth section, because the circumstances and conditions under which they carry freight to the shorter-distance points

and to the longer-distance points are not substantially similar but are substantially dissimilar. They contend, further, that their tariff of rates does not violate the third section for substantially the same reason as exempted them from the operation of the fourth section, and that any preference the tariff gives to the longer-distance points, or prejudice or disadvantage in any respect whatsoever to which it subjects the shorter-distance points, is not undue or unreasonable, but the just and reasonable result of the substantial dissimilarity in conditions and circumstances under which the freight is carried and delivered to the different points, respectively. They also deny that the rates complained of are unreasonable or unjust, and insist that they are in themselves reasonable and just.

In the case of the Interstate Commission v. Alabama Midland Ry., 168 U. S. 144, the Supreme Court say: "That competition, is one of the most obvious and effective circumstances that make the conditions under which a long and a short haul is performed substantially dissimilar—and as such, must have been in the contemplation of Congress in the passage of the act to regulate commerce—has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: *Ex parte Koehler*, 31 Fed. Rep. 315; *Missouri Pacific Ry. v. Texas & Pacific Railway*, 31 Fed. Rep. 862; *Interstate Commerce Commission v. Atchison, Topeka, etc., Railroad*, 50 Fed. Rep. 295; same v. *New Orleans & Texas Pacific Railroad*, 56 Fed. Rep. 925; *Behlmer v. Louisville & Nashville Railroad*, 71 Fed. Rep. 835; *Interstate Commerce Commission v. Louisville & Nashville Railroad*, 73 Fed. Rep. 409.

But the question whether competition as affecting rates is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court.

To prevent misapprehension it should be stated that the conclusion to which we are led by these cases, that in applying the

provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, competition which affects rates is one of the matters to be considered—is not applicable to the second section of the act. . . .

In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections; but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of undue or unreasonable preference or advantage, or what are substantially similar circumstances and conditions. . . . We are unable to suppose that Congress intended by the fourth section, and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do; much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts."

The Commission's report says that the present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from the competing markets like St. Louis, Baltimore, Cincinnati, etc., and, with some modifications occurring from time to time, has been in effect for a considerable period. While it makes no similar finding with reference to Opelika showing whether or not the adjustment of rates to that point is the outcome of severe competition, either between carrier and

carrier or between market and market, its recitals of what the proof shows as to conditions there are to that effect, and the testimony of numerous credible witnesses is clear and pointed to the effect that the adjustment of rates to Opelika is the outcome of controlling competition. It is true that with reference to both points, the force of this competition has been recognized by the respective appellees, and its influence has by agreement between them been so adjusted as to fix the rates to each of these points; but witnesses showing thorough competency to testify to the fact, state that this adjustment of the rates has been brought about and is maintained by the force of the competition bearing upon those points. It is argued by counsel for the appellant that by this agreement as to rates, the carriers have contracted to not compete. But it is not shown or reasonably suggested on what ground or for what consideration the competing carriers consented to accept a lower rate to these longer distance points than they charge to the shorter distance points, if they could just as well have agreed and contracted to charge as great or greater rates to the longer than to the shorter distance points.

A careful consideration of the circumstances and conditions shown by the proof constrains to the conclusion that the difference in the circumstances and conditions has caused the difference that is complained of in the rates. The Commission in its report says: "Competition has not forced rates down at Kingston, Marietta, and Cartersville." These are junction points reached by more than one railroad. No railroad other than the Western & Atlantic runs to Calhoun, Adairsville or Acworth. Some of the shorter-distance points between Augusta and Atlanta, and between Atlanta and Opelika, have more than one railroad reaching them, but the proof shows that at none of them is there such competition as affects rates, or, to use the language of the Commission, "as has forced rates down."

In these cases, the Circuit Court found that the rates complained of do not violate the fourth section of the act to regulate

commerce; that the lesser charge to the longer-distance point results from dissimilar circumstances and conditions brought about by competition, and does not give a preference which is undue and unreasonable to the longer-distance point; and that there is nothing whatever in the evidence or in the record from which it can be justly concluded that the rates to any of the local points named are not reasonable and just. (88 Fed. Rep. 186.)

The most careful consideration of the testimony brought up in the records in these cases does not disclose any evidence that was offered by the appellant in the Circuit Court tending to show that the rates, separately considered, to the respective points are not reasonable and just; and the replies that were drawn by a most skillful cross-examination from the witnesses called by the appellees, do not show or tend to show that the rates to the respective points are not reasonable and just. On the contrary, the great volume of testimony given by these witnesses (who show full competency to testify) is directly and clearly to the effect that the rates are reasonable and just. One witness gives as a reason for this opinion (for the subject is hardly susceptible of better proof than the opinion of experts), that the rates are fixed upon the lowest obtainable combination of the rates to competitive points with the local rates therefrom to the non-competitive points, so that the traffic to the non-competitive stations has the benefit of whatever reduction competition has effected in the adjustment of rates to the competitive points; and that the rates are lower than prevail in some of the other sections of the country, and lower than can be obtained by any other means of transportation, and are not higher than are charged from other points of distribution to stations on other railroads under similar circumstances and conditions. And, another witness says, the rates are, "just and reasonable, in that they are not unjustly or unreasonably high. They are lower than the rates at which the property can be transported by any

other means of transportation. They have not prevented the shipment of freights. Traffic has been shipped with profit under these rates. They are just, relatively, to rates to other points in the State of Georgia similarly situated. These rates are based upon rates to Chattanooga, which are controlled and fixed by competition, and added to the rates from Chattanooga to the several stations, which are the same for the same distance as the rates fixed by the Railroad Commission of Georgia." These reasons do not convince the counsel for the appellant, but appear to us to have weight. The testimony also shows (and it has become largely a matter of common knowledge) that competition between carriers, whether by rail or by water, not only affects the rate for which freight can be carried, but also substantially affects the circumstances and conditions under which the transportation of freight is conducted. By way of illustration, one witness says, it will and does require a road to run trains at a high rate of speed. It requires the carrier frequently to have cars loaded to a less weight per car. It often requires the carrier to take a part of a carload without waiting to fill up the car. It will frequently require the road to be less rigid in resisting the payment of claims made against it, the payment of which the company might successfully resist, and would stoutly contest at a non-competitive point. The doing of all of these things, and many more like them not necessary to be done in the absence of competition, is rendered necessary by the presence of such competition, to the degree in which it is present, in order that the carrier may get its share of the business at the competitive point. The testimony shows that the rates of freight from the Ohio river points to Atlanta are entirely controlled by competition. The points between Chattanooga and Atlanta get the benefit of the strong competition at Chattanooga, but there is not at those points the same force of competition which controls the rates at Atlanta. The testimony of the witnesses and the report of the Commission show that Opelika is not situated on any water-course, and is at the intersection of only two railways, but that

it is affected by certain conditions which happen to exist at that point, and which are not to be found at ordinary local stations or even at ordinary junctions. With its two railroads as terminal carriers, it is connected at comparatively short distances with numerous and extensive systems of rail and water carriage which make it possible for freight to reach Opelika from the northern and eastern ports, and from Ohio river points, by many different routes, the strong competition between which different carriers comes to a focus at Opelika. Counsel for the appellees concedes, that in taking into consideration competition as one of the circumstances and conditions affecting transportation, care must be had to keep within reasonable limits. He submits that, in these cases, the reasonable limits are three: (1) that the rates charged to the shorter-distance points must not be unjust or unreasonable within the purview of the first section of the act to regulate commerce; (2) that the competition at the longer-distance points must be such as subserves the public interest; it must also be real, and such as to compel the acceptance by the carriers of the rates which they do accept to those points; and (3) that the rates to the longer-distance points must yield a profit (though it may be very small) over the additional cost of the movement of the competitive traffic. He contends that, if the rates to the shorter-distance points are just and reasonable the appellees ought not to be required to reduce them, even though such reduction may be necessary to place the shorter-distance points upon a "rate equality" with the longer-distance points, because such a reduction in rates to the shorter-distance points involves a serious reduction in the revenue which the appellees derive from the present rates to those points. If the competition at the longer-distance points is real and such as to affect rates, the carrier must accept those rates or abandon the competitive traffic. If the competitive rates are something more than the additional cost of the movement of the traffic it is to the interest of the carrier and to the interest of the public that the carrier should be allowed to compete for the traffic. The profit, however small, to

the extent that it inures, increases the revenues of the carrier, and has a tendency to reduce local rates and to improve the local service. There may be a wide difference between a rate or amount of compensation that would give full remuneration for the service in carrying the competitive traffic and that remuneration therefor which the competitive conditions will allow the carrier to receive. The full measure of reasonable remuneration to the appellees for the carriage of competitive freight to Atlanta would require a rate sufficient to pay not only the additional cost of moving the competitive traffic, but also that proportion of operating expenses, fixed charges, and reasonable profit to the owners of the carrier lines which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier. And that rate would, doubtless, be applied and enforced if the circumstances and conditions permitted it to be done. But as no higher rate than a full compensatory one should be applied and enforced under the most favorable circumstances and conditions, it is manifest that it cannot be applied to traffic that is subject to severe competitive conditions.

There is in these cases no complaint by the appellant, or by any of the witnesses whom the appellant called, that the rates to Atlanta, Opelika, Chattanooga, Augusta and other competitive points are too low. There is a suggestion by the Commission, that the average of the rate per ton per mile tends to show that such complaint could not well be made, and that these rates are at least reasonably high. And the testimony offered by the appellees shows that, considering the competitive conditions in operation at those points, the rates to those points are reasonably remunerative. On the basis of this evidence it is earnestly contended by counsel for the appellant that the rates at the longer distance points being shown to be reasonably remunerative and the rates at the shorter distance points being admitted to be higher, the latter must of logical necessity be found to be unreasonably high, and, therefore unreasonable and unjust, and

such as give an undue preference to the longer-distance points, and subject the shorter-distance points to an undue and unreasonable prejudice and disadvantage. It will be perceived that this argument excludes all consideration of the force of competition, and ignores its presence at the longer-distance points and its comparative absence from the shorter distance points. What is a reasonable action, or a reasonably remunerative rate for carriage at a given time and place, necessarily has relation to the circumstances and conditions bearing upon the actor or upon the carrier at the time and place. The appellant does not say—and the Railroad Commission of Georgia did not say, and none of the witnesses called by the appellant in the cases have said—that the rates at any of the points, considered separately, are too high or too low, or are not reasonable and just. The burden of their complaint is that the relation between the rates is wrong. It is not insisted or even suggested that the rates to the longer-distance points should or can be raised. Nor is it now asked that the rates to the shorter-distance points shall be lowered. It is asked only that the appellees shall be required to cease and desist from charging more for the shorter than for the longer haul. This requirement seems to have possible relation only to the fourth section of the act. It cannot adequately meet the requirements of the first and third sections, if either of them is violated by the conduct from which the appellees are required “to cease and desist.” If the mere charging of a greater rate for the shorter than for the longer haul gives an undue and unjust preference to the longer-distance points and subjects the shorter-distance points to any undue prejudice or disadvantage, it is difficult to see how the charging exactly the same rate for the shorter haul that is charged for the longer shall escape condemnation.

The appellees are held to be subject to the act and to the jurisdiction of the Commission, because by express or implied agreement they have consented to carry freight on through bills of

lading from points beyond the State of Georgia to points within that State. The sixth section of the act to regulate commerce, as originally passed and as since amended, recognizes the existence and validity of such contracts or agreements, express or implied, and makes certain provisions with reference to the action of the connecting carriers parties thereto. The act does not, however, require such connecting carriers to enter into such agreements. Nor does it authorize the Commission to require through routing and billing, or to establish and fix through rates over connecting lines. *Gulf, etc., Railway Company v. Miami Steamship Company*, 52 U. S. App., 732; *New York, New Haven & Hartford Railroad Company v. Platt*, 7 Interstate Com. Rep., 323. It does not authorize the Commission to fix rates in any case. *Cincinnati—New Orleans & Texas Pacific Railway Company v. Interstate Commerce Commission*, 162 U. S., 184.

The Railroad Commission of Georgia is authorized, and required, to fix rates. Sec. 6, Act 269, Part 1, Title 12, of Georgia (1878-1879). And that commission has fixed a schedule of just and reasonable rates, which is called the Standard Tariff. Only three roads—the Western & Atlantic, the Rome Railroad (operated by the Western & Atlantic), and the Georgia Railroad—are required to observe this Standard Tariff of rates. All of the other roads in the State are allowed certain percentages of increase, except on classes C, D, F, J, and P, and are allowed to charge rates from ten to fifty per cent. higher than the Standard Tariff rates. The Western & Atlantic Railroad, extending from Chattanooga to Atlanta, does not lie wholly within the State of Georgia, but being owned by the State of Georgia and now operated by the Western & Atlantic Railroad Company under a lease from the State, is subject throughout its whole extent to the rates imposed by the Georgia commission. The competition which affects rates is at least as severe at Chattanooga as it is at Atlanta. Some of the witnesses depose that it is stronger at Chattanooga, by reason of the influence there of the Tennessee

river. Various systems of connecting lines lying north and west of Chattanooga are affected by this strong competition, which has its controlling influence throughout the whole length of their lines from Ohio river points to Chattanooga, on all freight carried to that point or to be carried through it; and hence they cannot claim more or be forced to receive less for carriage to that point than the competitive conditions there require.

For like reasons, the Western & Atlantic Railroad Company cannot obtain more for the carriage of this competitive freight from Chattanooga to Atlanta than the difference between the rates to Chattanooga and the rates to Atlanta, which have been fixed by competition beyond the control or appreciable influence of the Western & Atlantic Railroad. Therefore, as to that competitive traffic, this road has no option as to the rate at which it will take the traffic, and must either decline to receive the freight or must accept for its carriage the difference between the two rates, which are fixed by the controlling competition. As to the intermediate stations on the Western & Atlantic Railroad, that carrier is under not the same duress, but feels its force to the extent that for carrying the competitive freight in question from Chattanooga to Marietta it cannot charge the full rate allowed by the Georgia Commission, for if it insisted on doing so the freight could and would go by another route to Atlanta; and thus, instead of getting a haul of one hundred and seventeen miles, the distance from Chattanooga to Marietta, the Western & Atlantic could get only a haul of twenty-one miles, the distance from Atlanta to Marietta.

Therefore, in fixing the rates to these intermediate points, the through rate to that competitive point, which combined with the local rate from the competitive point to the point of destination will give the lowest through rate to the non-competitive point, controls. As the non-competitive point thus gets the benefit of the lowest rate to any of the neighboring competitive points; and as the carriage of the competitive traffic to the respective

competitive points is remunerating to the carriers to an extent that more than pays the expense of moving the competitive traffic, it is difficult to perceive how the non-competitive points are subject to any undue or unreasonable prejudice or disadvantage by this scheme of rate-making.

Our conclusion is that the Circuit Court did not err in refusing to enforce the orders of the Commission in these cases, and, therefore, the decrees of that Court from which these appeals are taken are affirmed.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 585

THE LOUISVILLE & NASHVILLE R. R. ET AL.,
APPELLANTS,

versus

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS, FOURTH CIRCUIT.

MOTION TO VACATE SUPERSEDEAS

To Ed. Baxter and Joseph W. Barnwell, solicitors for appellants.

Please take notice that on behalf of Henry W. Behlmer, appellee, I will, on Monday, the 14th day of *March*, 1898, at 12 o'clock M., or as soon thereafter as counsel can be heard, on the transcript of record herein and also on the certified transcript of a part thereof hereto annexed and marked "Exhibit A," make the following motion to the Supreme Court of the United States:

And now comes Henry W. Behlmer, appellee, in above cause, by Claudian B. Northrop, his solicitor, and moves the court to vacate the supersedeas in the above cause, or for an order declaring that the appeal bond filed by appellants in said cause does not operate as a supersedeas, on the ground that the section 16 of the Act to Regulate Commerce forbids the security required on appeal to the Supreme Court to operate as a supersedeas in cases arising under that act.

Respectfully,

CLAUDIAN B. NORTHROP,
Solicitor for Henry W. Behlmer, Appellee.

EXHIBIT A.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,	}	Appeal from the Circuit Court of the United States for the District of South Carolina.
<i>vs.</i>		
The Louisville & Nashville Railroad Company et al., Appellees.	}	

[Argued May 28, 1896. Decided November 3, 1897.]

Heard by GOFF, Circuit Judge, and HUGHES and MORRIS,
District Judges.

C. B. NORTHROP, Counsel for Appellant; ED. BAXTER,
W. A. HENDERSON, J. W. BARNWELL, J. B.
CUMMING, J. E. BURKE, Counsel for
Appellees.

GOFF, Circuit Judge :

On the 27th day of June, 1894, the Interstate Commerce Commission entered an order requiring the appellees to cease and desist on or before the 15th day of July, 1894, and thenceforth abstain from charging, demanding, collecting or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by and under the circumstances and conditions similar to those appearing in this case from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously

charged and received for the transportation of hay and such other commodities for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. Such order was entered as the result of the hearing of the petition that had been theretofore filed before such Commission, by the appellant, Henry W. Behlmer. In this complaint so filed he alleged, in behalf of himself and other merchants and residents of Summerville, that the defendants were charging an unreasonable and excessive rate of 28 cents per 100 pounds on hay in car-load lots, from Memphis to Summerville; that Summerville is an incorporated town of considerable size and importance, situated on the South Carolina Railway, in the State of Carolina, and twenty-two miles inland from the city of Charleston; and that said rate of 28 cents per 100 pounds is 9 cents per 100 pounds greater than the defendants charge and receive for transporting hay in car-loads from Memphis through Summerville to Charleston, and that such greater charge constituted a violation of the long and short haul clause of the Interstate Commerce Act; that said rate of 28 cents to Summerville was equal to the rate of 19 cents in force on hay in car-loads from Memphis through Summerville to Charleston, with the local rate of 9 cents per 100 pounds charged over the South Carolina Railway, for carrying hay from Charleston back to Summerville; and that the 9 cent local rate which the complainant was forced to pay, in addition to the through Charleston rate, in order to get hay transported from Memphis to Summerville, was unreasonable and excessive; that the petitioner carried on a wholesale hay and grain business in said town of Summerville, and was thus 22 miles nearer than Charleston to the western points where grain shipments originated; that the petitioner received at Summerville two car-loads of hay ordered by him and shipped to him from Memphis, Tennessee, which hay was so transported to him from Memphis to Chattanooga, 310 miles, by and over the lines of the Memphis & Charleston R. R., thence to Atlanta, Georgia, 152 miles, by the lines of the East Tennessee, Virginia & Georgia R. R., thence to Augusta, Georgia, 171 miles, over the lines of the Georgia, R. R., thence to Summerville, 115 miles, over the lines of the South Carolina Railway Co.; that the defendants were common carriers under a common control and management, for continuous carriage or shipment, or were

engaged in the transportation of passengers and property wholly by railroad, between the points mentioned. Also that the two car-loads of hay referred to were hauled from Memphis to Summerville over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions as was the Charleston traffic; that the haul from Memphis to Summerville was twenty-two miles shorter than the haul from Memphis to Charleston, and that such shorter distance was included in the longer distance; that the petitioner was forced to pay 28 cents per 100 pounds on said shipment to Summerville, the shorter distance, when the rate to Charleston, the longer distance, was 19 cents per 100 pounds; that the petitioner was thereby obliged to pay \$56.00 in the aggregate as freight on the two car-loads of hay from Memphis to Summerville, when the same shipment would have been made by the same roads, over the same rails, in the same direction, to Charleston, a greater distance of twenty-two miles, for a less sum, to-wit: \$38.00 in the aggregate. The petitioner further alleged that the local rate of 9 cents per 100 pounds for twenty-two miles, as also the aggregate charge of 28 cents per 100 pounds, from Memphis to Summerville, was excessive and unreasonable, and, therefore, in violation of the act to regulate commerce. It was further alleged by the petitioner that all of the railway lines mentioned in the petition and made defendants in said proceedings, were members of the Southern Railway & Steamship Association, and that the discrimination and excessive rates against Summerville existed not only on hay, but on all other articles of interstate commerce coming to that place, greatly to the detriment and disadvantage of that town, and to the business of its merchants. The petitioner prayed that the notice required in such cases issue to said railroad, and that the Interstate Commerce Commission would order that the defendants cease from violations of the law in the particulars mentioned, and for such other and further relief as the Commission might think proper.

The notice issued and the defendants duly appeared and filed their answers. The joint answer of the receivers of the East Tennessee, Virginia & Georgia Railway Co. and of the Memphis & Charleston R. R. Co. admits that such companies are subject to the act to regulate commerce, and in effect that the shipment of hay took place

as set forth in the petition, but it was not admitted therein that the rates specified constituted a violation of the law, and proof of the same was demanded. The answer of the lessees of the Georgia R. R., as also the answer of the receivers of the South Carolina Railway Co., are in substance the same. Concerning the petitioner's allegations of a violation of the fourth section of the Interstate Commerce Act, the answers make the following averments, in substance: that the Georgia R. R., Co., and the other carriers complained against have no joint through tariff from Memphis to Summerville, and that, therefore, they have no "line," in the sense of said section, from Memphis to Summerville, on which that section can operate; that the transportation of the two car-loads of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, for the reason that Summerville is a local station on the South Carolina Railway, not on any water route, and that enterprise and capital has not constructed more than one railroad to it; that consequently it has not the advantage of competition of carriers, as the said railroad on which it is located is not compelled by competition to choose between a reasonable rate and a rate which is much below what is reasonable; and that at Charleston there exists competition with numerous other all-rail routes between Memphis and that city, eight of which are mentioned by name, and the lines composing the same set forth in detail. The claim was made by the defendants in their answers that all such lines were actual competitors for business from Memphis to Charleston; that Charleston was a port on the Atlantic coast, easy of access for vessels from Baltimore, Philadelphia, New York, Boston and other eastern ports from which hay is shipped by water; that if the railroads running from Memphis to Charleston charged rates to all places as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be shipped from Memphis to Charleston, but the latter city would be supplied with hay from the north Atlantic ports, and said railroads would not only be deprived of such business, but that Memphis would lose the hay market; that the rates on western produce to Charleston and other coast cities are made with a view to actual existing water competition; that western produce, such as grain and hay,

can be shipped from Chicago to Charleston, through the ports of New York, Philadelphia or Baltimore, over continuous water routes by the lakes and canal, or over combined rail and water routes; that the all-rail lines, seeking to do business between Chicago, Charleston and the coast cities, are compelled to make their rates approximate those offered by the continuous water route or the combined rail and water routes; that the all-rail routes make their rates as much higher as the difference in services will permit, and those rates are correspondingly adjusted from all western points such as Evansville, Cairo-St. Louis and Memphis, the present all-rail rates on hay per 100 pounds being as follows: from Chicago, 33 cents; from St. Louis, 28 cents; from Louisville, Evansville and Cairo, 23 cents; from Memphis, 19 cents. The defendants claimed, therefore, that the rate from Memphis to Charleston on hay was forced upon their lines by actual existing water competition as well as by other additional competition beyond their control; that the controlling element in the said competition is the lake, canal and ocean transportation between Chicago and Charleston, or the lake transportation from Chicago to Buffalo or other lake ports, thence by rail to New York, and thence by ocean to Charleston, or rail transportation from Chicago to Baltimore, Philadelphia or New York, and thence by ocean to Charleston.

The case being at issue upon the complaint and answers—the testimony having been duly taken—the same was, after argument by counsel, duly submitted to the Commission, which directed the order to the appellees hereinbefore referred to, and, as required by law, it caused a properly authenticated copy of its report and of its findings of fact and conclusions thereon, together with a copy of said order, to be delivered to each and all of the parties to said cause, their receivers and successors in operation.

The defendants to said proceeding before the Interstate Commerce Commission having failed and refused to obey such order, the said Henry W. Behlmer filed his petition, as he was authorized by the Interstate Commerce law to do, in the Circuit Court of the United States for the District of South Carolina, in which the action had before the Commission was fully set out, and the refusal of the defendants therein to comply with what he charged to be the lawful order of the Commission was alleged, and

the prayer was made that an order be entered granting to the petitioner a writ of injunction restraining the defendants, their officers, servants and attorneys, from continuing in their violation and disobedience to said order of the Interstate Commerce Commission; and that finally, an order and decree be issued restraining the said defendants, and each of them, and their officers, servants and attorneys, from further violating or disobeying the requirements of said order of the Commission, and decreeing permanent obedience to the same, together with such further and additional orders as are usually entered under such circumstances.

The court below, on the 2nd day of November, 1894, directed that the defendants appear and answer said petition, and show cause, if any they could, why the prayer of the same should not be granted. In the same order, it was provided that the defendants be restrained and enjoined, until the further order of the court, from charging, collecting or receiving any greater compensation on the aggregate for the transportation of hay, or other commodities, carried by them under circumstances and conditions similar to those in this case, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and such other commodities, respectively, for the longer distance from Memphis to Charleston, and also the South Carolina & Georgia R. R. Co., was restrained and enjoined from imposing, charging and collecting the added local of 9 cents in addition to the through rate of 19 cents to Charleston.

The case was duly matured and came on to be finally heard on the 11th day of December, 1895, when after argument the court took the same under advisement, and afterwards, on the 22nd day of January, 1896, entered a decree dismissing the bill. From this decree the petitioner appealed.

At the time of the institution of the proceedings before the Interstate Commerce Commission the South Carolina Railway Co. was represented by Daniel H. Chamberlain, its receiver, who was made a defendant, and who filed his answer to the petition. The proceedings were instituted in December, 1892, and the order of the Commission issued on the 27th day of June, 1894, but prior thereto, on April 12, 1894, the South Carolina

Railway Co. was sold by virtue of a decree of the Circuit Court of the United States for the District of South Carolina, entered in the cause of *Bound vs. South Carolina Railway Co. et al.*, in which said cause the said Daniel H. Chamberlain had been appointed such receiver. On the 12th day of May, 1894, the purchaser of said property under said foreclosure sale conveyed the same to the South Carolina & Georgia R. R. Co., a defendant herein. That company moved the court below to dismiss these proceedings, so far as it was concerned, for the reason that there was no evidence before the court of any notice to, or service of the same upon said company, of the institution of this action before the Interstate Commerce Commission, nor any evidence of any refusal or neglect by it to obey the order of the Commission. The court below was of opinion that there was no evidence of the service of the Commission's order on the South Carolina & Georgia Railway Co., nor of its refusal or neglect to obey the same, but as there were other defendants as to whom it was necessary to dispose of the questions raised, the court proceeded to a decree concerning the same.

The petition filed in the court below avers that the findings and conclusions of the Commission in the matter of the petition filed before it by the appellant, together with a copy of the order and notice, were delivered to each and all of the parties to the cause, their receivers and successors in operation. We think the evidence sufficiently sustains these allegations. The South Carolina Railway Co. had due notice of the proceedings before the Commission, and filed its answer through its receiver, and it plainly appears that a registered letter was sent from the office of the secretary of the Commission in July, 1894, and duly delivered at Charleston to the successor of said South Carolina Railway Co.—the South Carolina & Georgia R. R. Co.—which contained a copy of the opinion and order of the Interstate Commerce Commission made and filed in the matter of said petition. That such copy was received by the South Carolina & Georgia R. R. Co. is not doubted, and the point relied upon by that company in its motion to dismiss made in the court below was that the name of the South Carolina & Georgia R. R. Co. is not mentioned in said order and opinion, and the further fact that said company was organized after the date when such order and opinion were made and filed. In our judgment

this position of the South Carolina & Georgia R. R. Co. is without merit. So far as the questions involved in this controversy are concerned, we think it had sufficient notice, and in fact that it was bound by the notice served upon and the answer filed by the receiver of the South Carolina Railway Co. The petitioner in his complaint filed with the Commission charged the South Carolina Railway Co. and its receiver with unlawfully charging an unreasonable rate of freight on certain articles transported over its line and other lines with which it had traffic arrangements, and the Commission, after full investigation, found that the petitioner's allegation was true, and ordered that said road and the others connected with it cease, on or before July 15, 1894, to make such unlawful charges. We are utterly unable to agree with the contention that such order of the Commission was rendered absolutely nugatory, within a few days after it was issued, by the mere fact that the name of one of the railroads mentioned therein had in the meantime been changed, while the traffic arrangements theretofore in existence were still in force. To so hold would render it impossible for any petitioner to obtain relief in cases similar to this, and would in fact prevent the Commission from enforcing its lawful orders. The Supreme Court of the United States in the case of *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290, 309, in effect decides this point in the manner we have indicated when it says in substance that if by the mere dissolution of the association originally proceeded against the suit abates, that then defendants have thereby discovered an effectual means to prevent the judgment of the court being given on the question really involved in the case.

We do not think it essential to the decision of this case to further consider the argument of counsel relating to the pecuniary liability of the purchaser or property sold under foreclosure decree, nor of the responsibility of such purchaser for contracts made by the receiver prior to such sale, as, in our judgment, the propositions of law therein involved are not applicable to the facts and circumstances of this case. We conclude that the court below had jurisdiction of the parties and of the subject matter involved, and such being the case, it was its duty as a court of equity to make both its jurisdiction and

its remedy effectual for perfect relief, if it found the allegations of the petition to be true.

This brings us to the real question in this case, and that is have these defendants violated the provisions of the fourth section of the act of Congress, approved February 4, 1887, entitled "An Act to Regulate Commerce." (24 Statutes at Large, 379.) That section reads as follows: "Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distance for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

We find this case, so far as the fourth section is involved, to be quite similar to the case of *Cin., N. O. & Tex. Pac. Railway v. Int. Com. Com.*, 162 U. S., 184, commonly known as "*The Social Circle Case.*"

That the appellees, in transporting the hay and other property mentioned in the petition filed in this cause, and in establishing the rates on the same from Memphis to Charleston, and from Memphis to Summerville, were engaged in such transportation under a common management for continuous carriage or shipment, within the meaning of that language as used in the Act to Regulate Commerce, is, we think, without doubt, and therefore it follows that it was within the jurisdiction of the Interstate Commerce Commission to ascertain whether, in charging a higher rate for a shorter than for a longer distance over the same line in the same direction—the shorter being included within the longer distance—the appellees were transporting such property under substantially similar circumstances.

stances and conditions. The appellees alleged, both before the Commission and the court below, such substantial dissimilarity of circumstances and conditions as justified them in making the greater charge for the shorter haul complained of in the petition, and upon them was the burden of showing affirmatively that such circumstances and conditions were in fact substantially dissimilar. The Commission, in ascertaining the facts, found against this claim of the railroad companies and entered the order, the enforcement of which was the object of the petition filed by the appellant. The Circuit Court, however, on hearing the matters involved, sustained the claim of the appellees and refused to enforce the order of the Commission.

The appellees claim that the substantial dissimilarity in the circumstances and conditions under which they transport property from Memphis to Charleston, and from Memphis to Summerville, is created by : 1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all-water lines, or by all-rail lines, or part rail and part water routes. 2. The competition of all-rail lines between Memphis and Charleston.

The decisions of the Interstate Commerce Commission, concerning the proper construction of this fourth section of the Commerce act, have not been uniformly sustained by the decrees of the courts of the United States in cases instituted for the purpose of enforcing the orders of the Commission concerning that section, and, therefore, prior to the announcement of the opinion of the Supreme Court in the *Social Circle case* there was much confusion concerning the true meaning of the same. A careful reading of that opinion impels us to the conclusion that the construction given that section by the Interstate Commerce Commission, in a number of cases decided by it prior to such decision, is the proper one. In this connection may be cited the following : *The James & Mayer Buggy Co. v. The Cin., N. O. & Tex. Pac. R. Co. et al.*, 3 Inters. Com. Rep., 682 ; *Ga. R. R. Co. v. Clyde S. S. Co.*, 4 Inters. Com. Rep., 120 ; *Chattanooga Board of Trade v. East Tenn., V. & G. R. Co.*, 4 Inters. Com. Rep., 213. Such being our conclusions, we have now to determine whether or not the facts found by the Commission are supported by the evidence taken in this case, or, in other

words, whether or not the circumstances and conditions attending the transportation of hay from Memphis to Charleston, and from Memphis to Summerville, are so dissimilar as to justify the rates charged, respectively. Does the competition set up by the appellees as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions within the meaning of the said fourth section of the Act to Regulate Commerce? Did such competition in fact affect rates between Chicago, the North Atlantic ports and Charleston? We are of the opinion that it was not of controlling force; that it was not such effectual competition as would constitute the dissimilar circumstances and conditions which would justify the Commission, upon application to it, in authorizing the carrier to charge less for the longer than for the shorter haul. We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic from any particular locality, unless one line could perform the service if the other did not. Such we believe to be the true meaning of said fourth section, so far as the point we are now considering is involved. We are also of opinion that the competition claimed by the appellees to exist between the different markets—particularly those of Memphis, Chicago, and the North Atlantic ports—to supply the trade of Charleston in the products mentioned, is not in reality the competition that affects rates from a particular locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character and not connected with the usual conditions under which transportation is conducted, nor does such competition in our judgment create the dissimilar circumstances and conditions referred to in the fourth section of the act now under consideration. And we further hold

that competition between carriers subject to the requirements of said act does not produce such substantial dissimilarity in the circumstances and conditions under which the transportation is performed, as will justify such carriers in making a greater charge for the shorter than for the longer haul, without an order to that effect from the Commission, granted by it as provided for in the proviso to the fourth section.

It is fair to presume that if the facts in any given case justify departure from this rule, the Commission will, on a proper showing, grant the relief asked for, and make such exceptions as the circumstances suggest as proper, and justice to the carrier, as well as the shipper, demands. If the carriers were permitted to determine such questions, the conflicting results produced by opposing interests would not only cause confusion, but work great injury in many cases to the shippers, to localities, and also to certain lines of business that would be affected thereby. If the competition of markets, or of carrying lines, subject to the provisions of the Commerce act, justify carriers in making greater short haul and lower long haul charges, over the same line, without an order from the Commission, issued after due investigation, then the unjust rates for transportation existing when that law was enacted, and which it was intended should be prohibited by it, will continue to be imposed and collected, and schedules shall be made, announced and maintained, to the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others. This statute was intended to prevent any and all kinds of discrimination in favor of localities, individuals or corporations, and to put all shippers on the same footing—that of perfect equality.

The rate from Memphis to Charleston on hay and grain, and like products, is reasonable, and is shown by the evidence to be remunerative, it is fair to presume that it would not have been made by the railroads, unless those controlling them were satisfied that it would be so, and, consequently, to justify the higher charge for the shorter haul to Summerville, which, we have found was made under substantially similar circumstances and conditions, the Commission, after application to it for that purpose, must find certain reasons for the same, after due investigation, that may in fact exist, but which, we are

compelled to say, are not now disclosed by the record before us. In the light of the act to regulate commerce, and keeping in view the theory upon which it was constructed, it is not difficult to understand why application was not made to the Commission for permission to charge less for the longer haul to Charleston than for the shorter haul to Summerville, when the rate proposed was 19 cents per 100 pounds for the longer and 28 cents per 100 pounds for the shorter.

The appellees contend that the smaller charge for the greater distance is, in this case, of great importance to the city of Charleston, as well as to the section of country adjacent thereto, as by means thereof the merchants of that city are enabled to build up a trade that otherwise would be lost to them. That may be true, but is not the same argument applicable to Summerville and other interior cities along the lines of the roads operated by the appellees between Charleston and Memphis? In order to build up one locality, we should not tear down many others; and justice to one section should not be purchased at the expense of another.

It should be kept in mind that the petitioner does not ask that the rate from Memphis to Charleston be changed—that it shall be made less and, consequently, unremunerative, or increased, and thereby cause the loss of the traffic—but only that the rate from Memphis to Summerville shall not be greater than the rate to Charleston.

Finding the facts to be as above indicated—substantially as found by the Interstate Commerce Commission in the proceedings instituted before it by the appellant—and construing the laws as we do, it follows that the order issued by said Commission to the appellees was a lawful order, of which they had due notice, and which it was and is their duty to obey and respect.

We do not find it necessary to consider and dispose of the questions raised in the pleadings and argued by counsel, concerning the Southern Railway and Steamship Association, nor the matter of the added local charge of 9 cents from Charleston to Summerville, otherwise than it may be involved in the through rate to Summerville.

The decree of the court below dismissing the bill is reversed, and this cause is remanded to said court with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, col-

lecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. Said court will also see that the requirements of said decree are immediately carried into effect, and enforced, as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of his proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

Reversed and Remanded.

MORRIS, District Judge :

I am unable to join in the order reversing the decree of the Circuit Court, which it is proposed to pass in this case, and will very briefly state my reasons :

Behlmer, in his petition to the Commission, complained that he was charged as freight on two car-loads of hay from Memphis to Summerville at a rate of twenty-eight cents per hundred, while the rate over the same roads to Charleston, twenty-two miles farther, was only nineteen cents. This, he alleged, was a violation of the fourth section of the Interstate Commerce Act. He further complained that the nine cents additional per hundred charged to Summerville was based on the local rate for twenty-two miles from Charleston back to Summerville over the South Carolina Railroad, which itself, he alleged, was excessive and unreasonable, and he further alleged that the combined rate of twenty-eight cents from Memphis to Charleston was excessive and unreasonable and in violation of the first section of the act.

The defendants answered, alleging that there were eight all-rail routes which were competitors for the business from Memphis to Charleston ; that there was besides existing water competition from ports on the Atlantic coast to Charleston ; and that the rate from Memphis to Charleston of nineteen cents per hundred was forced upon

the defendant lines by this rail and water competition which they had to meet at Charleston, but which the South Carolina Railroad did not have to meet at Summerville, and that rates which were just and reasonable to Summerville would result in the loss of the business if charged to Charleston.

The Commission considered only the allegation that the defendants violated the long and short haul clause, and in view of their decision on that point, deemed it unnecessary to consider whether any other provision of the law had been violated.

In the decision of the Commission appears the following:

"There is no showing in this proceeding of competition by lines not subject to the act to regulate commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be carried to Charleston by various rail and water or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the Commission for relief under the proviso clause of that section, but for the reasons stated in our decisions of the cases above cited, they do not justify carriers in departing from the rule of the fourth section without such relieving order. Water competition to justify lower long-haul rates must exist between the point of shipment and the longer distance destination. One transportation cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone, if the former did not undertake it. The competition of markets or the competition of carrying lines subject to regulation under the act to regulate commerce does not justify carriers in making greater short haul or lower long haul charges over the same line without an order issued by the Commission on application therefor after investigation."

The decision then quotes the rule of practice of the Commission with reference to the applications under the proviso of the fourth section, and then proceeds:

"Because Charleston is an important seaport and rail

road centre, and hay may be and is carried there from various points, is not a sufficient reason for a departure from this rule. The just interests of the carrier are fully protected by the proviso clause of the fourth section. The defendants are under no obligation to compete at low rates for the carriage of hay from Memphis to Charleston. They ought not to engage in such competition, if the rates obtainable are not remunerative. If they are remunerative, the defendants cannot, in the face of the prohibition of the 4th section, and the provision in that section for the issuance of relieving orders, assume to say that such rates, though profitable on Charleston traffic, are insufficient for the transportation of car load quantities to a shorter point on the same line and in the same direction."

There was no finding of fact by the Commission other than is contained in the foregoing extract from its decision, and it is obvious that the Commission did not pass upon the question of the dissimilarity of the circumstances and conditions, nor upon the question whether the rate for the shorter haul was of itself reasonable and just. They took the law to be that by charging a greater rate for the shorter haul over the same line, the carriers were *prima facie* without justification, and that they could only be permitted lawfully to make the charge after they had been authorized upon application to the Commission under the proviso of the 4th section. One of the cases cited by the Commission in support of this proposition of law is the decision of the Circuit Court of Appeals in *Int. Com. Com. vs. Cin., N. O. & Tex. Pac. R'y.*, now known as the "*Social Circle Case.*"

The Supreme Court, in reviewing that case (162 U. S., 184-194), did not approve such a hard and fast rule, but held in that case that as the Commission had found as a fact that the circumstances and conditions were not so dissimilar as to justify the rates charged, and as the Circuit Court of Appeals had approved that finding, the Supreme Court would not disturb it. But in the case known as the "*Import Case.*" 162 U. S., 197, the Supreme Court held, in deciding a similar question, that it was error for the Commission not to consider an existing competition which affected rates, and the fact that rates had to be reduced in order to secure freight, which otherwise would go by other routes, was one of the circumstances and conditions which must be considered before substantial similarity could be determined.

It may be fairly said, therefore, that the Commission failed to consider one of the circumstances without which it could not arrive at a just finding. *Tex. Pac. R'way v. Int. Com. Com.*, 162 U. S., 197-238; *Int. Com. Com. v. The Alabama Midland R'w'y Co.*, Ct. Ct. of App., 5th Circuit; *Int. Com. Com. v. L. N. R. R. Co.*, 73 Fed. Rep., 409.

It was error, I think, for the Commission to hold that the carriers could not justify themselves because they had not first made application for relief under the proviso of the 4th section. It has been held that if the carrier can show that the circumstances and conditions of the two hauls are dissimilar, the statute has not been violated (*Int. Com. Com. v. A. T. & S. F. R. R. Co.*, 50 Fed. Rep., 295), and this seems a reasonable construction of the law.

The case, therefore, it appears to me, came into the Circuit Court without any finding of the fact upon which an order against the carriers could be predicated. The Circuit Judge examined the testimony and considered the evidence tending to prove that the through rate had been forced down by the natural advantages of Charleston as a trade center, having numerous routes by rail, by rail and water, and by water over which merchandise of the kind in question was brought to that city, and to compete with which the defendant carriers were obliged to reduce their railroad rates on through freight to Charleston. Summerville had no similar natural or artificial advantages, and its only carrier, the South Carolina and Georgia Railroad, was not subject to having its local rates forced down by competition below what was reasonable and just.

Upon consideration of all the proven facts, the Circuit Judge found that the circumstances and conditions were not substantially similar, and that the defendant carriers had not violated the act.

With this conclusion I agree. There is abundant proof to support it, and also to show the great loss which would result to the South Carolina & Georgia Railroad (the successor of the South Carolina Railroad), if it was required to conform its local rates to its share of the through rates.

DECREE.

UNITED STATES CIRCUIT COURT OF APPEALS.

FURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,

vs.

Louisville and Nashville Railroad Company, The Central Railroad and Banking Company of Georgia, and H. M. Comer, its Receiver, as lessees of the Georgia Railroad; The Memphis and Charleston Railroad Company; The East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink and Charles M. McGhee, as Receivers of said last two mentioned Roads; and The Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia and Georgia Railway Company; The South Carolina Railway Company and its Receiver, Daniel H. Chamberlain, and The South Carolina and Georgia Railroad Company, the purchaser, assignee and successor of the same, Appellees.

Appeal from the
Circuit Court
of the United
States for the
District of
South Carolina.

This cause came on to be heard on the transcript of the Record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with cost; and this cause is remanded to the said Circuit Court of the United States for the District of South Carolina, at Charleston, with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under

circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis, aforesaid, to Charleston, in the State of South Carolina. That said court will also see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

It is further ordered that the mandate of this court issue after the expiration of 20 days from the date hereof.

NATHAN GOFF.

November 6, 1897.

PETITION FOR REHEARING.

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,	}	Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston, S. C.
<i>vs.</i>		
The Louisville & Nashville Railroad Company, et al.,	}	
Appellees.		

To the Honorable, the Judges of the United States Circuit
Court of Appeals, for the Fourth Circuit:

Your petitioners, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the pur-

chaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, respectfully show to your Honors that this cause came on to be heard in this Honorable court on the Transcript of the Record from the Circuit Court of the United States for the District of South Carolina; and on consideration whereof it was, on the sixth day of November, 1897, ordered, adjudged and decreed by this court as follows, viz.:

"That the decree of the said Circuit Court, in this cause be, and the same is hereby reversed, with costs, and this cause is remanded to the said Circuit Court of the United States for the District of South Carolina, at Charleston, with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. The said court will also see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

"It is further ordered that the mandate of this court issue after the expiration of 20 days from the date hereof."

No mandate has yet been issued.

Your petitioners are advised and humbly submit that said order and decree of this court of November 6th, 1897, is erroneous, and the same ought to be reversed; and your petitioners respectfully state the following grounds, viz.:

1. It is respectfully submitted that this court erred in reversing said decree of said Circuit Court in this cause.

2. It is respectfully submitted that this court erred in remanding this cause to said Circuit Court.

3. It is respectfully submitted that this court erred in instructing said Circuit Court to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce; and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

4. It is respectfully submitted that this court erred in not affirming the decree of said Circuit Court, which was reversed by this court.

5. It is respectfully submitted that this court erred because it failed to adjudge and decree that the matters of equity alleged in the bill filed in said Circuit Court, in this cause, are fully denied in the answer, and are not sustained by the proof, and that said bill be dismissed.

6. It is respectfully submitted that this court erred, because it, in effect, decided that the rates charged by petitioners for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, are unjust and unreasonable.

7. It is respectfully submitted that this court erred, because it, in effect, decided that the transportation of hay or other commodities carried by petitioners from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, is a like and contemporaneous service rendered under substantially similar circumstances and conditions, with the transportation of hay or other commodities carried by petitioners from Memphis, Tennessee, to Charleston, S. C.

8. It is respectfully submitted that this court erred, because it, in effect, decided that as petitioners make a greater charge in the aggregate on hay or other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., than they make on such freight carried by them from Memphis, Tennessee, to Charleston, S. C., they thereby give to Charleston, S. C., and its traffic an undue or unreasonable preference or advantage, and subject Summerville, S. C., and its traffic to an undue or unreasonable prejudice or disadvantage.

9. It is respectfully submitted that this court erred, because it, in effect, decided that the transportation by petitioners of hay or other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, as compared with the transportation by petitioners of hay or other commodities carried by them from Memphis, Tennessee, to Charleston, S. C.

10. It is respectfully submitted that this court erred, because it, in effect, decided that the Interstate Commerce Commission has the power to fix the rates of transportation from Memphis, Tennessee, to Summerville, South Carolina, to be charged by petitioners as common carriers subject to the Act to Regulate Commerce.

Petitioners submit herewith a duly certified copy of the opinion of the Supreme Court of the United States in the case of the Interstate Commerce Commission, Appellant, *vs.* The Alabama Midland Railway Company et al., Appellees, No. 203, October term, 1897, of said court; which opinion was delivered by said court on November

8th, 1897, five days after the opinion in this case was delivered by this court.

Wherefore petitioners respectfully pray that this cause may be reheard before this court; that the issuance of the mandate in this case be suspended until this application can be heard, and that the said order and decree rendered by this court in this cause on November 6th, 1897, may be reversed, and that said decree of the Circuit Court of the United States for the District of South Carolina, rendered in this cause, be affirmed, with costs, and that such other orders and decrees may be made as to your honors may seem meet and the circumstances of the case may require. As in duty bound your petitioners will ever pray, etc.

ED. BAXTER,
Solicitor for Petitioners.

I, Ed. Baxter, an attorney and solicitor, practicing in United States Circuit Court of Appeals, Fourth Circuit, do certify that in my opinion the grounds stated in the above petition for a re-hearing are well founded in law and fact, and that this cause is proper to be reheard before your Honors, if your Honors shall think fit.

ED. BAXTER,
Attorney and Solicitor.

ORDER REFUSING REHEARING.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,	} Appeal from the Circuit Court of the United States for the District of South Carolina.
<i>vs.</i>	
Louisville and Nashville Rail- road Company, et al.,	
Appellees.	

This cause having been decided at this term in favor of the appellant, and the appellees, by Ed. Baxter, attorney, having presented to the court on the 10th day of November, 1897, a petition for a rehearing of the cause.

It is now here ordered and adjudged by this court,

that the rehearing asked for be, and the same is hereby, refused.

It is further ordered that the mandate of this court to the court below be withheld until the 20th day of January, 1898.

NATHAN GOFF.

November 24, 1897.

PETITION FOR APPEAL.

IN UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,	}
<i>vs.</i>	
The Louisville & Nashville Railroad Company, et al.,	
Appellees.	

Said appellees, the Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company; the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of the two last mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; and the South Carolina Railway Company and its receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, conceiving themselves aggrieved by the decree entered in this cause in said United States Circuit Court of Appeals, on the sixth day of November, 1897, do hereby appeal from said decision to the Supreme Court of the United States, and they pray that their said appeal may be allowed, and that a transcript of the record and proceedings and papers,

upon which said decree was made, fully authenticated, may be sent to the Supreme Court of the United States.

JOS. W. BARNWELL,

Solicitor for S. C. & Ga. R. R.

ED. BAXTER,

Solicitor for Appellees, as of record.

January 17, 1898.

ASSIGNMENT OF ERRORS.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS,

FOR THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant, }
 vs. }
The Louisville & Nashville Rail- }
road Company et al., Appellees. }

On the 17th day of January, in the year of our Lord eighteen hundred and ninety-eight, came the said appellees, the Louisville & Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company; the East Tennessee, Virginia and Georgia Railway Company, Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of the last two mentioned roads; and the Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia and Georgia Railway Company, and the South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, by Ed. Baxter and Joseph W. Barnwell, their solicitors, and say that in the decree rendered by said Circuit Court of Appeals in the above-entitled cause, on the sixth day of November, 1897, and in the record and proceedings in said cause in said court, there is manifest error in this, to-wit:

I.

That said Circuit Court of Appeals erred in reversing and remanding the decree rendered in the above-entitled cause on January 22nd, 1896, by the Circuit Court of the United States for the District of South Carolina.

II.

That said Circuit Court of Appeals erred in instructing said Circuit Court to enter a decree herein, requiring the appellees and each of them to ~~desist~~ from charging, demanding, collecting or receiving any greater compensation in the aggregate, for the transportation of hay or other commodities carried by them under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis, aforesaid, to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce; and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

III.

That said Circuit Court of Appeals erred in decreeing that said appellees should pay the costs of said cause in said Circuit Court of Appeals.

IV.

That said Circuit Court of Appeals erred in not affirming said decree rendered in said cause January 22nd, 1896, by said Circuit Court of the United States for the District of South Carolina.

V.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that the matters of equity alleged in the bill filed in the above-entitled cause, are fully

denied in the answer, and are not sustained by the proof, and that said bill be dismissed.

VI.

That said Circuit Court of Appeals erred because it in effect, decided that the rates charged by the above-named appellees for the transportation of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., are unjust and unreasonable.

VII.

That said Circuit Court of Appeals erred because it, in effect, decided that the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Summerville, S. C., is a like and contemporaneous service, under substantially similar circumstances and conditions, with the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Charleston, S. C.

VIII.

That said Circuit Court of Appeals erred because it, in effect, decided that as the above-named appellees make a greater charge in the aggregate on hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., than they make on such freight from Memphis, Tennessee, to Charleston, S. C., they thereby give to Charleston, S. C., and its traffic an undue or unreasonable preference or advantage and subject Summerville, S. C., and its traffic to an undue or unreasonable prejudice or disadvantage.

IX.

That said Circuit Court of Appeals erred because it, in effect, decided that the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Charleston, S. C.

X.

That said Circuit Court of Appeals erred because it, in effect, decided that the Interstate Commerce Commission has the power to fix the rates of transportation to be charged by the above-mentioned appellees for carrying freight from Memphis, Tennessee, to Summerville, S. C.

XI.

That the said Circuit Court of Appeals erred in directing that a counsel fee should be paid to the counsel of appellant in said court, and in not deciding that the act known as the Interstate Commerce Act, in so far as it directs the payment of a counsel fee to the successful party complaining against railroad corporations engaged as carriers of interstate commerce, while it provides for no similar counsel fee to such railroad companies in case judgment be in their favor, is unconstitutional and void, inasmuch as it deprives such railroad companies of their property without due process of law.

XII.

That said Circuit Court of Appeals erred in not sustaining the decree of the Circuit Court dismissing the petition of appellant as against the South Carolina & Georgia Railroad Company, appellee, on the ground that the said company was not served with the order of the commission requiring said company to desist from charging any greater compensation in the aggregate for transportation of hay or other commodities from Memphis to Summerville, than that contemporaneously charged and received from Memphis to Charleston.

XIII.

That the said Circuit Court of Appeals erred in deciding that there was any proof whatever of the service of a copy of the order of the Interstate Commerce Commission made in said cause upon the appellee, the South Carolina & Georgia Railroad Company; and in not deciding that it was beyond the power of the Circuit Court, after dismissing the petition of appellant, to alter, correct or amend said decree after the term had expired in which the decree dismissing said petition was filed.

XIV.

That said Circuit Court of Appeals erred in reversing the decree of the Circuit Court which found that the appellee, the South Carolina & Georgia Railroad Company, was not bound by the proceedings before the Interstate Commerce Commission brought against D. H. Chamberlain, receiver of the South Carolina Railroad Company, unless proof was made of the service upon said appellant of a copy of the order of said Interstate Commerce Commission, and in deciding that the purchase at a foreclosure sale of the property of the South Carolina Railway Company by a committee of its mortgage bondholders, and the conveyance of said property to a new corporation, the South Carolina & Georgia Railroad Company, was a mere change of name.

Wherefore, the above named appellees, the Louisville and Nashville Railroad Company, the Central Railroad and Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, pray that the said decree of said United States Circuit Court of Appeals for the Fourth Circuit, rendered November 6th, 1897, be reversed, and that said court be ordered to enter a decree affirming the said decree rendered on the said 22nd day of January, 1896, in the above entitled cause by the said Circuit Court of the United States for the District of South Carolina.

ED. BAXTER,

Solicitor for said appellees as of record,

JOS. W. BARNWELL,

Solicitor for the South Carolina & Georgia

Railroad Company.

APPEAL BOND.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 173.

Henry W. Behlmer, Appellant,	}
<i>vs.</i>	
The Louisville & Nashville Rail- road Company, et al.,	
Appellees.	

Know all men by these presents, that we, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis and Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, as principals, and Ed. Baster, as surety, are held and firmly bound unto the above named Henry W. Behlmer in the sum of two thousand dollars, to be paid to the said Henry W. Behlmer, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 17th day of January, in the year of our Lord, eighteen hundred and ninety-eight.

Whereas the above-named, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company,

the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company, the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the United States Circuit Court of Appeals for the Fourth Circuit, on the sixth day of November, 1897.

Now, therefore, the condition of this obligation is such that if the above-named Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company, the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

THE LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

[Seal.]

By ED. BAXTER,
Its Solicitor and Attorney in Fact.

THE CENTRAL RAILROAD & BANKING
COMPANY OF GEORGIA.

[Seal.]

By ED. BAXTER,
Its Solicitor and Attorney in Fact.
H. M. COMER, Receiver. [Seal.]

By ED. BAXTER,
His Solicitor and Attorney in Fact.

THE MEMPHIS & CHARLESTON RAILROAD
COMPANY. [Seal.]

By ED. BAXTER,
Its Solicitor and Attorney in Fact.

THE EAST TENNESSEE, VIRGINIA & GEORGIA
RAILWAY COMPANY. [Seal.]

By ED. BAXTER,
Its Solicitor and Attorney in Fact.

SAMUEL SPENCER, Receiver. [Seal.]

By ED. BAXTER,
His Solicitor and Attorney in Fact.

HENRY FINK, Receiver. [Seal.]

By ED. BAXTER,
His Solicitor and Attorney in Fact.

CHAS. M. MCGHEE, Receiver. [Seal.]

By ED. BAXTER,
His Solicitor and Attorney in Fact.

THE SOUTHERN RAILWAY COMPANY. [Seal.]

By ED. BAXTER,
Its Solicitor and Attorney in Fact.

THE SOUTH CAROLINA RAILWAY
COMPANY. [Seal.]

By ED. BAXTER,
Its Solicitor and Attorney in Fact.

DANIEL H. CHAMBERLAIN, Receiver. [Seal.]

By ED. BAXTER,
His Solicitor and Attorney in Fact.

THE SOUTH CAROLINA & GEORGIA RAIROAD
COMPANY. [Seal.]

By JOS. W. BARNWELL,
Its Solicitor and Attorney in Fact.

ED. BAXTER, Surety. [Seal.]

..... [Seal.]

Sealed and delivered and taken and acknowledged before me and approved by me, this 17th day of January, eighteen hundred and ninety-eight.

NATHAN GOFF, Judge.

ORDER GRANTING APPEAL.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS.

FOR THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant, }
 vs. }
The Louisville & Nashville Rail- }
road Company et al., Appellees. }

Said appellees, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company; the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, pray an appeal from the decree rendered by this court in the above-entitled cause, on November sixth, 1897, to the Supreme Court of the United States; and said appellees, having filed with the clerk of this court their petition for appeal, together with an assignment of errors, and an appeal bond, which bond has been duly approved, it is ordered, adjudged and decreed by the court that said appeal be granted and allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

January 17, 1898.

NATHAN GOFF.

CITATION ON APPEAL.

UNITED STATES OF AMERICA. } ss :

To Henry W. Behlmer—Greeting :

You are hereby cited and admonished to be and appear at the court-room of the Supreme Court of the United States, at Washington, on the 14th day of March, eighteen hundred and ninety-eight, pursuant to an appeal allowed and granted by the United States Circuit Court of Appeals for the Fourth Circuit, in the case of Henry W. Behlmer, appellant, *vs.* The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad ; The Memphis & Charleston Railroad Company ; The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads ; and The Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia and Georgia Railway Company ; The South Carolina Railway Company, and its receiver, Daniel H. Chamberlain ; and The South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, as appellees, to show cause, if any there be, why the decree of said Court of Appeals, rendered November 6th, 1897, should not be corrected and speedy justice should not be done to the parties on the behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January, in the year of our Lord eighteen hundred and ninety-eight.

NATHAN GOFF, Judge.

This citation may be served by the marshal of the district where said Henry W. Behlmer, or his solicitor of record in the above cause, may be found.

NATHAN GOFF, Judge.

Endorsed :

Service of a copy of the above citation is hereby acknowledged this 20th day of January, 1898.

CLAUDIAN B. NORTHROP,
Solicitor for said Henry W. Behlmer.

Personally comes James S. Simons, Chief Office Deputy Marshal, who being duly sworn deposes and says that he served a copy of the within citation on Henry W. Behlmer (personally) at Summerville, So. Ca., on 20 January, 1898.

J. S. SIMONS,
Chf. Office Deputy U. S. Marshal.

Sworn to before me Jany. 25, 1898.



J. E. HAGOOD,
C. C. C. U. S. .

CLERK'S CERTIFICATE.

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing are true copies of the original opinion, decree, petition for rehearing and order thereon, petition for appeal, assignment of errors, bond and order granting appeal, citation, &c., filed and now remaining among the records and proceedings of said court in the therein entitled cause.



In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 26th day of January, A. D. 1898.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,	}	Appeal from the Circuit Court of the United States for the Dist. of South Carolina.
<i>vs.</i>		
Louisville and Nashville Rail- road Company and other rail- roads, Appellees.		

APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

The mandate of this court, in this case, having been stayed by the order of the court pending the preparation of the papers and proceedings on the appeal of the appellees to the Supreme Court of the United States, and the proceedings on the said appeal having been perfected, and the order granting the said appeal having been entered, I have declined to issue the mandate of this court to the court below, in this cause, without the further order of this court.

Teste :



HENRY T. MELONEY,
Clerk U. S. Circuit Court of
Appeals, Fourth District.

January 22, 1898.

U. S. CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT,
CLERK'S OFFICE.

HENRY T. MELONEY,
CLERK.

Richmond, Va., Feb. 1, 1898.

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the November term, 1897, of the said court finally ad-

journe'd on this first day of February, 1898, at twelve o'clock M, as shown by the records of the said court.



In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 1st day of February, A. D. 1898.

HENRY T. MELONEY,
Clerk of said Circuit Court of Appeals.

BRIEF OF APPELLEE

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 585

THE LOUISVILLE & NASHVILLE R. R. ET AL.,
APPELLANTS,

versus

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
FOURTH CIRCUIT.

MOTION TO VACATE SUPERSEDEAS.

CLAUDIAN B. NORTHROP, SOLICITOR FOR APPELLEE.

The matter now before this court grows out of a proceeding, under the 16th section of the Act to Regulate Commerce. (U. S., Stat. at Large, Vol. 24, p. 379, amended U. S., Stat. at Large, Vol. 25, p. 855.) A petition was filed in the U. S. Circuit Court, Fourth Circuit, to enforce

the order of the Interstate Commerce Commission. That court dismissed the bill, and on appeal to the Circuit Court of Appeals for the Fourth Circuit the court below was reversed, and a decree entered Nov. 6, 1897, commanding the order of the Interstate Commerce Commission to be enforced. A petition for rehearing was filed and refused by the appeal court, and an order entered withholding the mandate until the 20th day of January, 1898. On the 17th day of January, 1898, an appeal was allowed to the Supreme Court and a bond approved, purporting to be a supersedeas bond, and the Clerk of the Circuit Court of Appeals certifies that he has declined to issue the mandate to the court below; the Nov. term 1897, Circuit Court of Appeals closed Feb. 1st 1898. All of which appears in the papers submitted herewith, and marked "Exhibit A."

"A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the Act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; * * " *Goddard v. Ordway*, 94 U. S., 672.

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. *Hagan v. Ross*, 11 How., 297; *R. R. Co. v. Harris*, 7 Wall., 575. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law."

Sage v. Cent. R. R. 93 U. S., 417.

It is clear, then, that those who invoke a supersedeas

must point to some statute allowing it, and must show that they have complied with its conditions in every particular.

As previously stated, this matter grows out of a proceeding under the 16th section of the Act to Regulate Commerce.

The provisions of that section, far from allowing a supersedeas, expressly forbid it, in the following language :

“ When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal, but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon.” * * U. S. Stat. at Large, Vol. 24, p. 379, Vol. 25, p. 855, Sec. 16.

In the case of *I. C. Com. v. A. T. & S. F. R. Co.*, 149 U. S., 264, this court decided that since the act of 1891 creating the United States Circuit Courts of Appeals, no appeal would lie direct to this court, and to this extent and in this particular the Commerce Act was modified.

It is well settled that a statute is impliedly repealed by a subsequent statute only so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it.

U. S. v. Henderson, 11 Wall., 652.

Wood v. U. S., 16 Pet., 342.

Tobin v. Murphy, 95 U. S., 191.

Under this rule, the provision of the Commerce Act forbidding a supersedeas in cases arising under it remains of force, there being nothing in the Circuit Court of Appeals Act of 1891 on that point repugnant to or plainly intended as a substitute for it.

The only statutes repealed by the act of 1891 were those inconsistent with sections 5 and 6 thereof. Sec.

14 of that act is as follows: " * * * And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writ of error in the preceding sections five and six of this act are hereby repealed." (U. S. Stat. at Large, Vol. 26, p. 829.) Section 5 of that act enumerates such cases as are directly appealable to this court. Interstate commerce cases are not included in the category, hence this court held that in such cases there was no direct appeal, 149 U. S., 264, but that under section 6 requiring all other cases than those mentioned in section 5, to go to the Court of Appeals they must take that course.

Section 6 of the appeal act 1891, contains a catalogue of the cases directly appealable to the Circuit Court of Appeals and makes the judgment of the latter tribunal final in certain cases such as admiralty and others specially mentioned, with power in this court to bring these up by certiorari, if it thinks proper, or for the Circuit Court of Appeals to certify any questions to this court for instruction. All cases not enumerated as final in section 6 are appealable of right to this court.

It thus appears that sections 5 and 6 of the act of 1891, simply deal with a classification of cases appealable directly to the Supreme Court and the Circuit Courts of Appeals, respectively, and for the review of cases from the latter court. These sections 5 and 6 do not mention at all the subjects of bonds or securities on appeal either to the Supreme Court or to or from the Circuit Court of Appeals. Neither is the subject of citation or other process mentioned or assignment of errors, but these sections are wholly and solely confined to classification and distribution of appellate jurisdiction. Appellate procedure is untouched by them. The repealing clause of the act of 1891 expressly states that it refers only to "acts and parts of acts" inconsistent with "the preceding sections five and six of this act." Sections "five and six" being absolutely silent on the subject of supersedeas, no inconsistency can or does

arise thereon, hence no existing law on that topic was repealed. So the provisions of the commerce act forbidding security on appeal to operate as a supersedeas, not being inconsistent with sections 5 and 6 of the act of 1891, remain of force.

**THE ACT OF 1891 EXPRESSLY ADOPTS AND PRESERVES
THE PROVISION FORBIDDING A SUPERSEDEAS.**

In addition to what has already been said, attention is called to the fact that the act of 1891 expressly preserves "all provisions of law now in force regulating the methods and system of review" * * "including all provisions for bonds or other securities," and commands that they shall apply and be enforced "in respect of the Circuit Courts of Appeals."

Section 11 of the act creating the Circuit Courts of Appeals reads as follows:

Sec. 11: "That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Courts of Appeals under the provisions of this act, shall be taken or sued out, except within six months after the entry of the order, judgment or decree sought to be reviewed. Provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Court of Appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act, in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the Circuit Courts of Appeals, in respect of cases, brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by

law belong to the justices or judges in respect of the existing courts of the United States, respectively."—U. S. Stat. at Large, Vol. 26, p. 829.

The important clause of this section to be analyzed is the following :

"And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error."

It will be observed that the terms of the statute are universal, the provisions to be preserved are "all," not some, and they apply to the new system of appeals created by the act. All the old practice on appeal is retained and governs and controls the new mode. In cases where assignments of error were required under the old practice they are retained under the new. In cases where bonds were necessary under the old law, they are made equally necessary under the new. Where, under the old mode, bonds were not necessary in a certain class of cases, as where the United States or a Department of the Government were the suitors, no bond is required by the new law. In cases where a supersedeas was allowed under the old law, it is still allowed, and the form of the bond is the same as before, in cases where a supersedeas was forbidden, it is still forbidden. In fact, all the old practice is retained, or in the words of the statute itself, "all provisions of law now in force," * * "including all provisions for bonds or other securities," * * "shall regulate the methods and systems of appeals and writs of error provided for in this act in respect of Circuit Courts of Appeals." The old practice and the old provisions are retained and made applicable to Circuit Courts of Appeals *eo nomine*.

One of the "methods and systems of appeals and writs of error provided for in this act," is an appeal to the

Supreme Court from the Circuit Courts of Appeals in cases arising under the Commerce Act, 149 U. S., 264. Hence "all provisions of law now in force," * * "including all provisions for bonds or other securities," "shall regulate," such appeals, "in respect of Circuit Courts of Appeals."

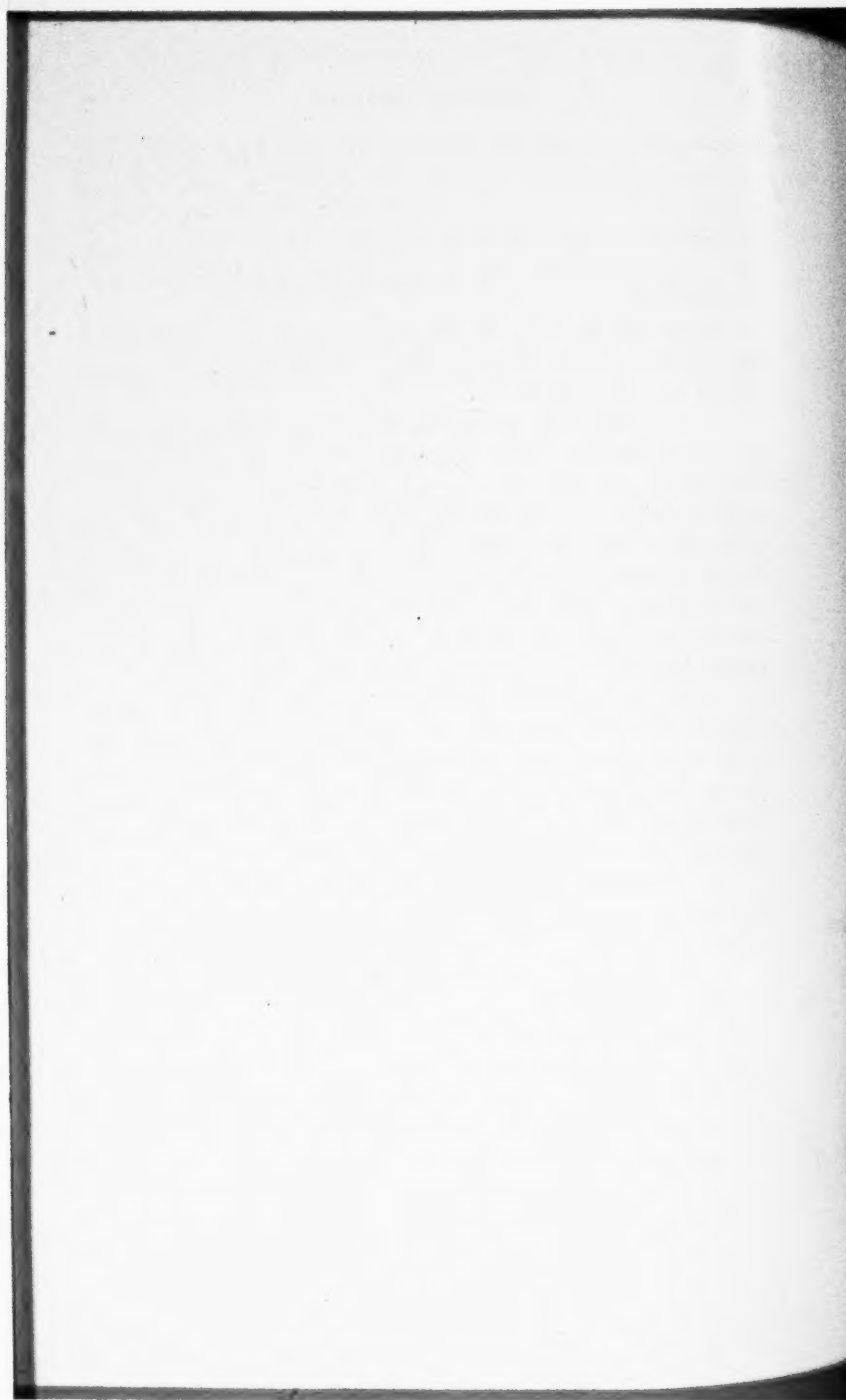
Such are the express requirements of the section, all prevailing provisions governing the old modes of appeal are to regulate the new.

It only remains to inquire what "provisions for bonds or other securities" were of force at the time of the adoption of the act of 1891. At that time, as we have seen, section 16 of the Act to Regulate Commerce read, and still reads, that an appeal might be taken to the Supreme Court "under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon."

This being the law in force at the time governing cases under the Commerce Act, it was expressly adopted and preserved by the act creating the Circuit Courts of Appeals, and made applicable to the new mode of appeals from those courts to the Supreme Court of the United States.

It is therefore respectfully asked that the motion be granted.

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.



Reply, City of Louisville
BRIEF OF APPELLANT

Filed March 14, 1897

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1897.

No. 885.

THE LOUISVILLE AND NASHVILLE RAILROAD
ET AL, APPELLANTS.

vs.

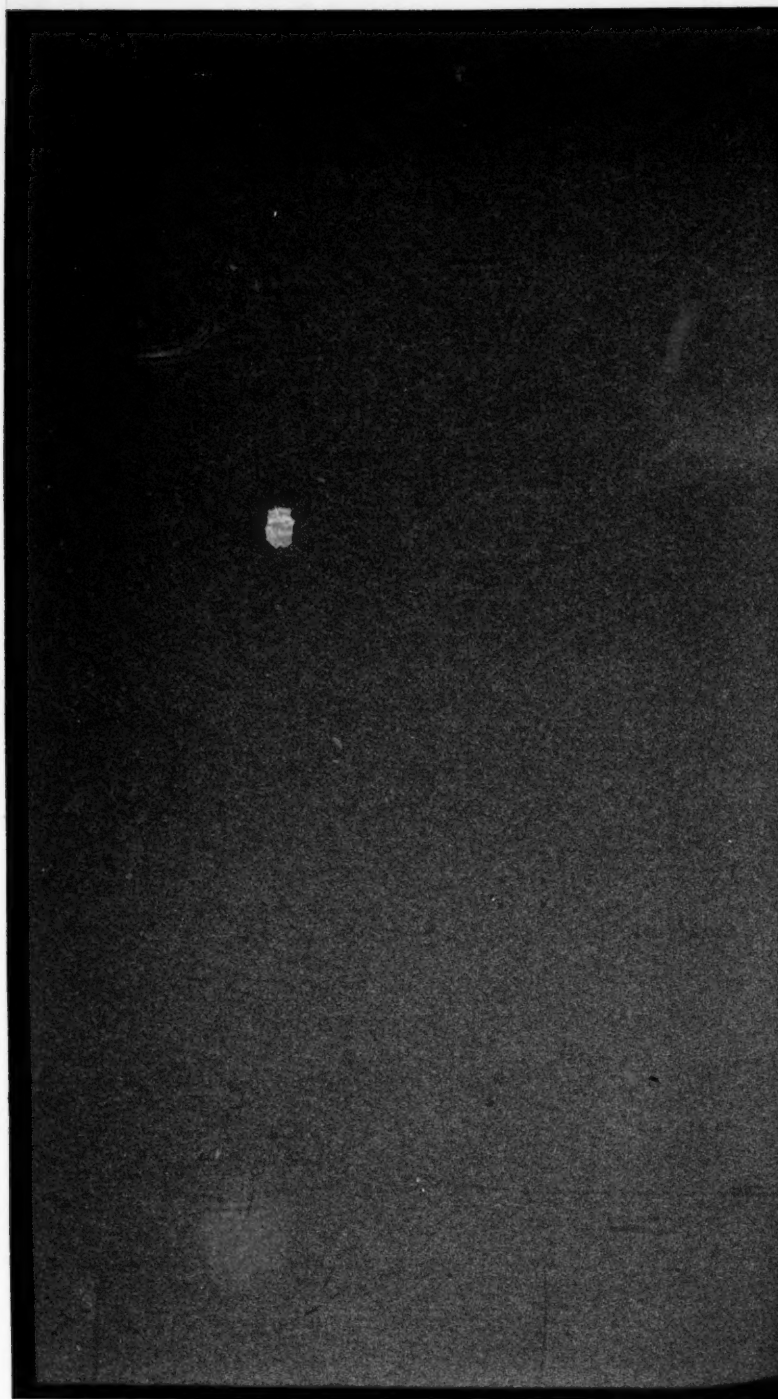
HENRY W. BEILMER, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, FOURTH
CIRCUIT.

MOTION TO VACATE SUPERSEDENDAS.

CLAUDEAN B. HOTTENROFF,

Solicitor for Appellee.



REPLY BRIEF OF APPELLEE.

**IN THE
Supreme Court of the United States.**

OCTOBER TERM, 1897.

No. 585.

**THE LOUISVILLE AND NASHVILLE RAILROAD
ET AL., APPELLANTS,**

vs.

HENRY W. BEHLMER, APPELLEE.

**APPEAL FROM THE CIRCUIT COURT OF APPEALS, FOURTH
CIRCUIT.**

MOTION TO VACATE SUPERSEDEAS.

Motion to Vacate the Proper Practice.

While practically conceding that this motion is the correct remedy in the premises, appellants nevertheless argue that resort should be had to the lower courts.

There is nothing in this contention, and it was thought unnecessary by appellee to consume the time of this court with a discussion of the point.

In *Keyser vs. Farr*, 105 U. S., 265, motion was made for a supersedeas by appellants, and by appellees to dismiss. Mr. Chief Justice Waite said, *inter alia* :

"After the acceptance of the bonds for the appeal and the docketing of the cause in this court, the jurisdiction of the court below was gone. From that time the suit was cognizable only in this court. In *Goddard vs. Ordway* (101 U. S., 745) there was nothing more than the formal order of allowance entered, as in this case, with the final decree. Such an order while in that condition, it was held, was subject to the control which every court retains over its ordinary judgments during the term. In *Draper vs. Davis* (102 U. S., 370), however, it was decided that after a bond had been accepted by one of the judges in accordance with such an order of allowance, the jurisdiction was transferred from the court below. Here a bond was not only accepted, but the case was actually entered in this court. In this way clearly the court below was deprived of power to make its order of November 14. It follows that the motion to dismiss, so far as it is based upon the order of the court below vacating its allowance of appeal, must be denied, and that the supersedeas which followed in law from the acceptance of the bond by the Chief Justice is in force. Such was our ruling in *Draper vs. Davis* (*supra*) on a similar motion at the last term."

The facts in this case of *Keyser vs. Farr* were that after the allowance of an appeal the required *supersedeas* bond was duly approved and the case entered here, the court below by a subsequent order, on November 14, vacated that allowance—this was held void, though made during the term at which the order allowing the appeal was entered.

In *Draper vs. Davis*, 102 U. S., 370, Mr. Chief Justice Waite said : "When the original bond of \$1,000 was accepted by the justice and the citation signed, an appeal was allowed and security taken, which operated as a *supersedeas*. That transferred the jurisdiction of the suit appealed to this

"court. * * * The power of the justice over the appeal and the security, in the absence of fraud, was exhausted when he took the security and signed the citation. From that time the control of the *supersedeas* as well as the appeal was transferred to this court." * * *

In the case at bar the court below has allowed the appeal, signed the citation, and approved a bond purporting to be a *supersedeas* bond, and the term has ended, the transcript has been sent up, and the case docketed here.

It is idle, therefore, to assert that relief is not to be sought in this court, which has "control of the *supersedeas* as well as the appeal."

On motions to vacate and grant, this court has frequently construed the statutes allowing a *supersedeas*. On similar motions it will construe a statute disallowing or forbidding a *supersedeas*.

In *Patterson vs. Hoa's Extx.*, 131 U. S., LXXXVIII, on a motion to vacate a *supersedeas*, it was decided by Chief Justice Waite that the appeal bond having been filed too late to make the writ operate as a *supersedeas*, the court vacates an order heretofore granted allowing a writ of *supersedeas* and directs same to be certified to the circuit court for the district of Louisiana.

In *Kitchen vs. Randolph*, 93 U. S., 86, Mr. Chief Justice Waite, on a motion to vacate a *supersedeas*, enters into an exhaustive discussion of the statutes relating to the subject, and holds that unless the law is strictly complied with, it is not within the power of a justice of this court to allow a *supersedeas*, and he therefore grants the motion. The questions raised and decided were those of power and jurisdiction under the law and not of mere informality.

In the case of *Sage vs. Cent. R. R. Co.*, 93 U. S., 412, there was a motion to vacate, and Mr. Chief Justice Waite says, at p. 416:

"In *Kitchen vs. Randolph*, *supra*, 86, we held that it was not within the power of a justice of this court to grant a

"supersedeas on a writ of error or upon appeal, unless the writ of error was sued out and served or the appeal taken within sixty days, Sundays exclusive, after the rendition of the judgment or decree complained of." (Italics mine.)

After an elaborate exposition of the law on the subject, he concludes:

"No *supersedeas* can follow from the appeal allowed by Mr. Justice Miller, because that clearly took effect after the expiration of the sixty days from the date of the decree. Neither can the order of the same justice have the effect of the allowance of a *supersedeas* on the original appeal, because, as has already been shown, that appeal was not taken in time.

"From this it follows that the motion to vacate the *supersedeas* must be granted."

These cases fully establish that this court will go into all the questions on a motion to vacate, and give a construction of the law bearing upon the points involved.

In the case of *Draper vs. Davis*, 102 U. S., the motion was for a *supersedeas*.

This court again fully discusses the law and the facts and says: "It follows that the *supersedeas* which resulted from the taking of the security on the 29th day of June is still in force and has never been vacated. Consequently, the court below is without *power* to proceed with the execution of the decree appealed from, and we will presume that upon an intimation of that kind from us it will not attempt to do so." (Italics mine.)

The motion was therefore denied without prejudice to its renewal.

The motion in the case at bar is framed with a view to this court adopting the course taken in *Draper vs. Davis*, 102 U. S., 371, should it think proper to simply declare the law and presume that the court below will need nothing further from this court than an intimation to the effect that it was without power to grant a *supersedeas* in the face of a statute

forbidding it, and that the "successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired and of which he cannot be deprived without due process of law." (*Sage vs. R. R.*, 93 U. S., 417.)

In all these cases and many others the question of power was considered, on a motion to vacate. In the words of Mr. Justice Brewer, 166 U. S., 511, "* * * the question of power being one of jurisdiction, is always open, and must whenever presented be considered and determined."

It is clear, then, that this proceeding is proper.

The cases cited by counsel for appellants on this point seem to have no bearing whatever on it. Both *Ex parte French*, 100 U. S., p. 1, and *In re Haberman*, 147 U. S., 525, were petitions for mandamus and were refused.

Intermediate Courts of Appeal.

Without obtaining a supersedeas the decrees of intermediate courts of appeal will go into effect.

Such was the opinion of this court in *Draper vs. Davis*, 102 U. S., 370, on an appeal from the supreme court of the District of Columbia in general term.

In that case this court denied a motion for a supersedeas on the ground that one already existed, but gave leave to renew the motion should it be necessary.

It thus appears that in the opinion of this court a supersedeas is necessary to prevent the enforcement of a decree of the supreme court of the District of Columbia in general term, the same being an intermediate court of appeal.

The same ruling was made by this court in *Keyser vs. Farr*, 105 U. S., 265, in reference to a decree of the supreme court of the District of Columbia.

In the case of *Telegraph Co. vs. Eyser*, 19 Wall., 419, the supreme court of Colorado Territory affirmed the judgment

of the territorial district court on September 6, 1873. A writ of error was sued out to this court and a supersedeas bond given and approved within sixty days. A motion was made "for a supersedeas to the supreme court of Colorado Territory and the district court in and for the county of "Arapahoe, in that Territory."

This court held that the steps taken operated as a supersedeas and said "The order asked for will be directed to "issue, unless this opinion shall render that procedure unnecessary." Again we see that in the opinion of this court a supersedeas is necessary to restrain the enforcement of a judgment of an intermediate court of appeals.

In *Board of Commissioners vs. Gorman*, 19 Wall., 662, the judgment of the supreme court of the Territory of Idaho was carried into effect after the expiration of the ten days during which the law forbids execution to issue. A writ of error was allowed to this court and a supersedeas bond approved within sixty days. It was claimed that the judgment was executed "after the allowance of a writ of error to this "court, which operated as a supersedeas." This court held: "The supersedeas under the act of 1872, by filing the bond "within sixty days, stays *further proceedings*, but does not "interfere with what *has already been done*."

Once more this court announces the doctrine that unless a supersedeas is duly obtained the judgment of an intermediate appellate court will be enforced, and this court will not interfere with what "*has already been done*" prior to the allowance of the supersedeas.

In the case of *Foster vs. Kansas*, 112 U. S., 201, judgment of ouster was rendered by the supreme court of Kansas April 1, 1884. The judge of the district court of Kansas was officially notified on the 7th of April, when the authenticated copy of the record of the supreme court was presented to him. He acted on it immediately by appointing a new county attorney to fill the vacancy caused by the judgment of ouster. Prior to this, on April 5, a writ of

error to this court for the reversal of the judgment of the supreme court of Kansas was allowed in Washington, a supersedeas bond approved, and a citation signed, but these papers did not reach Kansas until April 8, when they were lodged in the office of the clerk of the supreme court of Kansas.

On a rule to punish for contempt it was held by this court that the supersedeas did not operate until the papers were filed in the supreme court of Kansas, on April 8, and this was too late, the judgment of that court having gone into effect on April 7. The rule was discharged.

From these cases it appears conclusively that unless a supersedeas is duly allowed the judgments and decrees of intermediate courts of appeal must go into effect.

Appellants themselves seem to have conclusively admitted this by giving the bond on this appeal purporting to be a supersedeas bond. Had they not regarded it as necessary to suspend the decree of the circuit court of appeals, they would not have done so.

A supersedeas is a statutory remedy, and unless obtained by strict compliance with all required conditions the judgment or decree below must be enforced.

Mr. Baxter, at page 6 of his brief, says: "A supersedeas is not, strictly speaking, a *statutory* remedy."

This is somewhat surprising from such eminent counsel.

In the words of this court, quoted in appellee's opening brief:

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with (*Hogan vs. Ross*, 11 How., 297; *R. R. Co. vs. Harris*, 7 Wall., 575). Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond

"the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law." (*Sage vs. Cent. R. R.*, 93 U. S., 417.)

In *Kitchen vs. Randolph*, 93 U. S., 88, Mr. Chief Justice Waite said: "In 1803 appeals were granted in cases of equity and of admiralty and maritime jurisdiction, and made 'subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error' (2 Stat., 244, sec. 2). It has accordingly been held that an appeal, to operate as a *supersedeas*, must be perfected and the security given within ten days after the rendition of the decree (*Adams vs. Law*, 16 How., 148; *Hudgens vs. Kemp*, 18 How., 535; *French vs. Shoemaker*, 12 Wall., 100; *Bigler vs. Walker*, *id.*, 149). The allowance of the appeal is the equivalent of the writ of error."

This court then goes on in the same vein to discuss the act of 1872, increasing the time to sixty days. (R. S., sec. 1000.)

In *Saltmarsh vs. Tuthill*, 12 How., 389, a mistake was made by counsel in bringing the case to this court by appeal instead of by writ of error. The court below, upon discovery of this mistake, attempted to give relief by allowing a *supersedeas*.

Mr. Chief Justice Taney said:

"The writ of error afterwards sued out has brought the case regularly before this court; but as it was not sued out within ten days after the rendition of the judgment, the writ-of-error bond does not stay the execution under the act of 1789.

"Nor is there any equitable power in the circuit court to stay execution upon the ground that a mistake as to the manner or time of removing the case was committed.

"And it is immaterial in this respect whether it was the mistake of the party or the court; for this court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of Congress regulating appeals and writs of error upon any equitable ground. No such power is given to them by law. It was so decided in this court in *United States vs. Curry* and others, 6 How., 113, and *Hogan and others vs. Ross*, 11 *id.*, 297."

Chief Justice Taney concludes thus: * * * "We are satisfied from the facts before us that the circuit court, without any coercive process, will conform to the opinion of this court and issue execution when informed of this decision."

The case of *Hovey vs. McDonald*, 109 U. S., 150, does not conflict with these decisions. Continuing the quotation where Mr. Baxter leaves off, at page 160, we find Mr. Justice Bradley using the following language: "In this country the matter is usually regulated by statute or rules of court; and, generally speaking, an appeal, upon giving the security required by law (when security is required), suspends further proceedings and operates as a supersedeas of execution. This, as we have seen, is the case in the circuit courts of the United States."

He goes on to say that such is the intrinsic force of some decrees that only an affirmative order will suspend their operation—for instance, a decree granting, refusing, or dissolving an injunction—and he cites the *Slaughter House* cases, 10 Wall., 273, to that effect. This being the case, *Hovey vs. McDonald*, 109 U. S., 150, is a strong authority for appellee, as the decree appealed from in the case at bar grants an injunction, and there is no affirmative order suspending its operation.

It is also a matter of surprise to find Mr. Baxter saying, at page 6 of his Brief: "The provisions of the Judiciary act of the United States, as set out in the Revised Statutes

"hereinabove quoted, are *statutory regulations* of a right
 "which existed under the laws and orders of the chancery
 "court in England upon the adoption of the Constitution
 "and formation of the Government of the United States of
 "America."

He evidently overlooked the fact that at page 5 of his brief he quotes the language of this court, as follows: "In
 "England, until 1772, an appeal from a decree or order in
 "chancery suspended proceedings; *but since that time a contrary rule has prevailed there.*" (Italics mine.)

Hovey vs. McDonald, 109 U. S., 150-160.

The Constitution was adopted and this Government formed after 1772, when an appeal did not suspend proceedings under the English practice. No change was made in England until 1807. His conclusions as to the Judiciary act of 1789 being "*statutory regulations*" of an existing right are incorrect.

At page 11 of his brief Mr. Baxter says:

"There is no provision in the act of 1891 establishing the circuit court of appeals; that in case of an appeal from the circuit court of appeals to the Supreme Court of the United States, such appeal should not act as a supersedeas."

Neither is there a provision *in hæc verba* that it should, and if appellant's method of reasoning is correct, there is thus a hiatus in the law.

In the absence, then, of a statute allowing it there can be no supersedeas, as the remedy is statutory according to all the decisions of this court.

Appellant bases this contention on the erroneous notion that unless a statute forbids a supersedeas the old chancery practice allowed it. The contrary is true, as we have seen.

The Mandate.

Just what the learned counsel for the South Carolina and Georgia railroad means on this point is not quite clear.

If he takes the position that in cases appealable of right to this court from the circuit court of appeals the mandate of that court cannot go down, but must come only from this court, then he has discovered an effectual means of forever ending suits of this sort. All that need be done in this class of cases where the decree of the appeal court is against a party is for him to neglect to bring the case up to this court, and if the circuit court of appeals is powerless to send down its mandate the case, like Mahomet's coffin, will remain forever suspended.

In the case of *The Conqueror*, 166 U. S., p. 113, it was decided by this court that a certiorari to the circuit court of appeals could issue after the mandate of that court had gone down, and Mr. Justice Brown said: "We do not think the party complaining is limited to the six months allowed by section 11 of the court of appeals act for suing out a writ of error from the court of appeals to review the judgment of the district or circuit court, and it would seem that he is, by analogy, entitled to the year within which by section 6 an appeal shall be taken or writ of error sued out from this court to review judgments or decrees of the court of appeals in cases where the losing party is entitled to such review."

The act allows one year to appeal to this court from the circuit court of appeals in cases coming here by right. It surely will not be contended that no mandate of that court can go down for a year, awaiting the convenience of the losing party to appeal. This would be a great hardship on the successful litigant. "Justice delayed is justice denied" says Blackstone.

It would seem that the section of the act of 1891 requiring

this court to send its mandate down to the circuit court contemplates that the case has been sent back to the latter within the year allowed for appeal to this court. As this court has frequently decided, the act was passed to procure a speedy settlement of appeals, at that time an impossibility on account of the crowded condition of the docket in this court. It was not passed for the purpose of securing additional delays. The commerce act also requires matters arising under it to be determined "speedily." Celerity is the express object in both these statutes. Neither of them will be so construed by this court as to produce a contrary effect.

The case of *The Conqueror*, 166 U. S., 113, as we have seen, is authority for the proposition that a certiorari or appeal will be allowed to this court after the mandate of the circuit court of appeals has gone down. The converse of this must also be true, namely, that the mandate of the circuit court of appeals may go down after the allowance of an appeal or certiorari to this court, when there is no supersedeas.

The Judgment Reviewed Here is that of the Circuit Court of Appeals.

It is hard to follow the learned counsel for the South Carolina and Georgia railroad through the somewhat involved course of reasoning by which he arrives at the conclusion that "from the allowance of an appeal by the circuit court until the case is disposed of here there is only one appeal, and that appeal is equivalent to and in place of the appeal 'to the Supreme Court' allowed by the Interstate Commerce act prior to the reorganization of the judiciary system under the act of 1891" (Appellants' Brief, p. 9), and that "the intermediate court is for all purposes affecting the final judgment non-existent when the case properly reaches this court." (Appellants' Brief, p. 10.)

This contention can scarcely be made seriously by appel-

lants, for if this is to be regarded as an appeal from the circuit court, it must be dismissed.

I. C. Com. vs. A., T. & S. F. R. Co., 149 U. S., 149.

Webster vs. Daly, 163 U. S., 155.

Having come to this conclusion, counsel also takes the opposite position, that appeals from the circuit courts must not be confused with appeals from the circuit courts of appeals, as they are distinct and different (p. 14, Appellants' Brief). In this he is correct, for this court has said: "It is true that our decision necessarily reviews the decree of the circuit court in reviewing the action of the court of appeals upon it, and, under the statute, our mandate goes to the circuit court directly, but it is, notwithstanding, the judgment of the circuit court of appeals that we are called on primarily to revise." (*Union Pac. R'y Co. vs. Chicago, &c., R'y Co.*, 163 U. S., p. 593.)

Appellee fails to see and regards it as unnecessary to discuss the alleged inconsistencies pointed out by counsel that would arise in certain contingencies not now existing or before this court.

Appellee's position is simply that in all cases under the commerce act the decree of the court of appeals must be carried out. No inconsistencies can thus arise. If the court below be reversed it will obey the court above, pending appeal to this court. If the appeal court affirms the court below the same result follows.

The appeal to the Supreme Court being from the judgment of the circuit court of appeals, and that being the judgment reviewed here (163 U. S., 593, *supra*), that is the judgment from which no supersedeas is allowed, for, adopting the narrow construction urged by appellants, it is on the "appeal to the Supreme Court of the United States" that a supersedeas is forbidden. The words of the statute are "*such appeal shall not operate to stay or supersede the order of the court,*" "*such appeal*" being that brought to this court.

Appellee declines to believe that this court will hold an appeal to the circuit court of appeal a mere idle ceremony by which nothing is accomplished, and that its decisions are to be wholly ignored as if they were "non-existent."

Section 16 of the Commerce Act Not Repealed.

We think this has already been amply proved in appellee's opening brief, and counsel for the South Carolina and Georgia railroad practically admits it.

As to the case of *U. S. vs. Rider*, 163 U. S., 132, cited by Mr. Baxter, Mr. Chief Justice Fuller nowhere in the opinion states that the Judiciary act of 1891 repeals any laws not inconsistent with its scheme. On the contrary, he holds that review by certificate of division is abolished because "it is wholly inconsistent with the object of the act of March 3, 1891, which was to relieve this court and to dis-tribute between it and the circuit courts of appeal substantially the entire appellate jurisdiction over the circuit courts of the United States. *McLish vs. Roff*; *Lau Ow* *Bow's case*, 144 U. S., 47; *Construction Co. vs. Railway Co.*, 148 U. S., 372."

U. S. vs. Rider, 163 U. S., p. 139.

Mr. Baxter does not point out a single feature in which the provision in section 16 of the Commerce act forbidding a supersedeas is inconsistent with the Judiciary act of 1891. He does not even attempt to do so.

He simply says that because review by certificate of division has been repealed by the act of 1891 a clause in the Commerce act on a totally different subject was thereby repealed. This is hardly good logic.

Because this court held the income tax unconstitutional it by no means follows that a provision of the Commerce act forbidding a supersedeas has been annulled.

The income tax is a subject quite as pertinent to the ques-

tion under discussion as certificates of division. Moreover, sections 1000 and 1007, Revised Statutes, do not and never have applied to cases under the Commerce act. There always have been certain classes of cases exempt from the operation of these sections, and it is no new principle to except others, which the Commerce act did.

Doyle vs. Wisconsin, 94 U. S., 50.

Hovey vs. McDonald, 109 U. S., 150.

Granting, therefore, but for the sake of argument merely, that section 16 of the Commerce act is repealed, there is thus no statute allowing a supersedeas in cases arising under the Commerce act; hence none can exist, the remedy being purely statutory. It is familiar law that the abrogation of a later statute does not revive an older.

Section 16 of the Commerce Act Liberally Construed.

The act is remedial and for that reason to be liberally construed.

Wilkinson vs. Leland, 2 Pet., 627; *Silver vs. Ladd*, 7 Wall., 219; *Beaston vs. Farmers' Bank*, 12 Pet., 102; *U. S. vs. Bank of North Carolina*, 6 Pet., 29; *Bank of U. S. vs. Lee*, 13 Pet., 107.

We have already seen that Mr. Baxter is incorrect in saying that the provision forbidding a supersedeas is in derogation of the laws and practice of the chancery court of England at the time of the adoption of the Constitution and the formation of the Government of the United States of America (page 8 of his Brief). On the contrary, the practice of that court at that time was to enforce decrees below pending appeal.

Hovey vs. McDonald, 109 U. S., 150-160.

The reverse of his proposition is therefore true, and acts allowing a supersedeas being in derogation of the common

law must be strictly construed. This court has invariably done so.

Section 16 of the Commerce Act Applies to Circuit Courts of Appeal on Appeal Conclusively Decided in Three Cases by this Court.

Appellee's opening brief was made to show that the act of 1891 expressly adopted the provision of the Commerce act forbidding a supersedeas and made it applicable "in respect of circuit courts of appeal." Appellant's main contention, variously expressed and put in many different ways, but invariably amounting to the same thing, is this—that the clause in question only applies to the circuit court and does not apply to the circuit court of appeals.

This court, however, has distinctly held in three cases that section 16 of the Commerce act applies to and governs the circuit court of appeals. It is true that throughout the section there is much repetition of the phrase "such court" and "said court," referring to the circuit court. It is true the circuit court of appeals is not specifically mentioned at all, which is not strange, as it did not exist at the time of the passage of the Commerce act.

Nevertheless, in construing this section since the Judiciary Act this court has refused to give it any far-fetched and fantastic meaning, but has interpreted the law so as to make both acts effective in a sensible manner. It has not held that "such court" and "said court" meant wholly and solely the circuit court, and confined the operation of the section to that court alone. On the contrary, it has determined that whatever powers were given to the circuit court on the equity side under this section were also given to the circuit courts of appeal on appeal, and whatever restrictions the section placed upon circuit courts were also placed upon circuit courts of appeal.

The three cases in which this has been decided are the

"Social Circle case," "The Import case," and "The Troy case."

They are all reviewed and affirmed in the latter case, reported as *Interstate Commerce Commission vs. Alabama Midland Railway* (168 U. S., pp. 174, 175), where this court says: "The first contention we encounter, upon this branch of the case, is that the circuit court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the Commission has misconstrued the statute and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact and not of power, and hence unreviewable.

"We think this contention is sufficiently answered by simply referring to those portions of the act which provide that when the court is invoked by the Commission to enforce its lawful orders or requirements, the court shall proceed as a court of equity to hear and determine the matter and in such manner as to do justice in the premises.

"In the case of *Cincinnati, N. O. and Texas Pacific R. W. Co. vs. I. C. Com.* (162 U. S., 184) the findings of the Commission were overruled by the circuit court after additional evidence taken in the court, and the decision of the circuit court was reviewed in the light of the evidence and reversed by the circuit court of appeals, and this court, in reference to the argument that the Commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that as the question was one of fact, peculiarly within the province of the Commission, and as its conclusions had been accepted and approved by the circuit court of appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the circuit court

" of appeals should be affirmed. Such a holding clearly
 " implies that there was power in the courts below to con-
 " sider and apply the evidence and in this court to review
 " their decisions.

" So, in the case of Texas and Pacific Railway Company
 " *vs. Interstate Com. Com.* (162 U. S., 197), the decision of
 " the circuit court of appeals, which affirmed the validity of
 " the order of the Commission upon the ground that, even
 " if ocean competition should be regarded as creating a dis-
 " similar condition, yet that, in the case under consideration,
 " the disparity in rates was too great to be justified by that
 " condition, was reversed by this court, not because the cir-
 " cuit court had no jurisdiction to consider the evidence
 " and thereupon to affirm the validity of the order of the
 " Commission, but because that issue was not actually
 " before the court, and no testimony had been adduced
 " by either party on such an issue; and it was said that
 " the language of the act authorizing the court to hear and
 " determine the matter as a case of equity 'necessarily im-
 " plies that the court is not concluded by the findings or con-
 " clusions of the Commission.'

" Accordingly, our conclusion is that it was competent in
 " the present case for the circuit court, in dealing with the
 " issues raised by the petition of the Commission and the
 " answers thereto, and for *the circuit court of appeals on ap-
 " peal*, to determine the case upon a consideration of the
 " allegations of the parties and of the evidence adduced in
 " their support, giving effect, however, to the findings of
 " fact in the report of the Commission as *prima facie* evi-
 " dence of the matters therein stated.

" It has been uniformly held by the several circuit courts
 " *and the circuit courts of appeal* in such cases that *they* are not
 " restricted to the evidence adduced before the Commission
 " nor to a consideration merely of the power of the Commis-
 " sion to make the particular order under question, but that
 " additional evidence may be put in by either party, and

"that the duty of the court is to decide, as a court of equity, "upon the entire body of evidence." (Italics mine.)

This conclusively establishes that the words "said court" apply equally to the circuit court and the circuit court of appeals. The clause of section 16, under consideration in the Alabama Midland case, was "said court shall proceed to hear and determine the matter speedily as a court of equity." What court? Appellants would say the circuit court, and no other. Not so, answers the Supreme Court of the United States. No such narrow construction is to be put upon the statute. It is not to be so "cribbed, cabined, and confined." The power to determine the case is not only given to the circuit court, but to "*the circuit court of appeals on appeal.*" Such is the distinct language of the decisions.

This being the construction placed upon the section by the highest and final authority, it is idle for appellants to urge that the portion of section 16 forbidding a supersedeas applies only to the circuit court.

It is equally idle to contend that if the refusal of a supersedeas depended on conditions, which is not true, those conditions could not be fulfilled by the circuit court of appeals as well as the circuit court.

The appeal under this clause is given to "either party," and a supersedeas is equally refused to both, unconditionally.

However, the circuit court of appeals can fulfil all conditions. For instance, the circuit court of appeals is just as capable of declaring the order of the Commission lawful and requiring its enforcement as is the circuit court itself. So an appeal from the court of appeals is fully as sufficient as an appeal from the circuit court.

The words "said court" in the statute are used to designate the circuit court and the circuit court of appeals interchangeably. Both courts come within the ambit of the act, according to the express language of this court in the

Alabama Midland case. The motion should therefore be granted.

Appellants' contention that the motion should be refused because the circuit court or "said court," as they insist, dismissed the bill, and because the appeal is not from the circuit court or "said court," is mere quibbling, and should be disregarded.

Using the same style of reasoning, appellee might insist that, as the appeal is "to the Supreme Court of the United States," the motion must be allowed, as that is the exact language of the act.

It is respectfully urged that no such methods should be applied in construing laws passed for practical purposes, but that broad and sound principles should prevail.

It is, of course, forbidden to consider equitable grounds in matters concerning a supersedeas. In view of appellants injecting this element, appellee may be pardoned, however, for stating that the circuit court of appeals, after elaborate arguments on both sides, held this case under consideration for eighteen months, and the decision is the result of most careful thought. An abuse is adjudged to exist in exacting unjust rates from the public by carriers in contravention of the commerce act, passed to put a stop to such grievous wrongs as speedily as possible. The object of the act should be aided, in preventing the continuance of an adjudged evil at the earliest possible moment. Counsel for the South Carolina and Georgia railroad is mistaken about the Alabama Midland case. It does not, when correctly read, overrule the case at bar. On the contrary, it sustains the present case, and the circuit court of appeals refused a rehearing, notwithstanding a petition therefor based principally on the decision of this court in the Alabama Midland case. (See Exhibit A, pp. 3, 24, 25.)

Respectfully submitted.

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.

IN THE
Supreme Court of the United States.
OCTOBER TERM, 1898.

No. 244.

THE LOUISVILLE AND NASHVILLE RAILROAD
COMPANY ET AL., APPELLANTS,

vs.

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT.

STATEMENT OF THE CASE.

On the 27th day of June, 1894, the Interstate Commerce Commission entered an order requiring the appellants to cease and desist on or before the 15th day of July, 1894, and thenceforth abstain from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by and under the circumstances and conditions similar to those appearing in this case from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and such other commodities for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina. Such order was entered as the result of the hearing of the petition that had been theretofore, December 29, 1892, filed before such commission by the appellee, Henry W. Behlmer. In this complaint so filed he

alleged, in behalf of himself and other merchants and residents of Summerville, that the defendants were charging an unreasonable and excessive rate of 28 cents per 100 pounds on hay in car-load lots from Memphis to Summerville; that Summerville is an incorporated town of considerable size and importance, situated on the South Carolina railway, in the State of South Carolina, and twenty-two miles inland from the city of Charleston, and that said rate of 28 cents per 100 pounds is 9 cents per 100 pounds greater than the defendants charge and receive for transporting hay in car-loads from Memphis through Summerville to Charleston, and that such greater charge constituted a violation of the long and short haul clause of the interstate commerce act; that said rate of 28 cents to Summerville was equal to the rate of 19 cents in force on hay in car-loads from Memphis through Summerville to Charleston, with the local rate of 9 cents per 100 pounds charged over the South Carolina railway for carrying hay from Charleston back to Summerville, and that the 9-cent local rate which the complainant was forced to pay in addition to the through Charleston rate in order to get hay transported from Memphis to Summerville was unreasonable and excessive; that the petitioner carried on a wholesale hay and grain business in said town of Summerville and was thus 22 miles nearer than Charleston to the western points where grain shipments originated; that the petitioner received at Summerville two car-loads of hay ordered by him and shipped to him from Memphis, Tennessee, which hay was so transported to him from Memphis to Chattanooga, 310 miles, by and over the lines of the Memphis and Charleston R. R.; thence to Atlanta, Georgia, 152 miles, by the lines of the East Tennessee, Virginia and Georgia R. R.; thence to Augusta, Georgia, 171 miles, over the lines of the Georgia R. R.; thence to Summerville, 115 miles, over the lines of the South Carolina Railway Co.; that the defendants were common carriers under a common control and management for continuous carriage or shipment or were engaged in the transportation of passengers and property wholly by railroad between the points mentioned; also that the two car-loads of hay referred to were hauled from Memphis to Summerville over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions as was the Charleston traffic; that the haul from Memphis to Summerville was 22 miles shorter than the haul from Memphis to Charleston, and that such shorter distance was included in the longer distance; that the petitioner was forced to pay 28 cents per 100 pounds on said shipment to Summerville, the shorter distance, when the rate to Charleston, the longer distance,

was 19 cents per 100 pounds; that the petitioner was thereby obliged to pay \$56 in the aggregate as freight on the two car-loads of hay from Memphis to Summerville, when the same shipment would have been made by the same roads, over the same rails, in the same direction, to Charleston, a greater distance of 22 miles, for a less sum, to wit, \$38 in the aggregate. The petitioner further alleged that the local rate of 9 cents per 100 pounds for 22 miles, as also the aggregate charge of 28 cents per 100 pounds, from Memphis to Summerville, was excessive and unreasonable, and therefore in violation of the act to regulate commerce. It was further alleged by the petitioner that all of the railway lines mentioned in the petition and made defendants in said proceedings were members of the Southern Railway and Steamship Association, and that the discrimination and excessive rates against Summerville existed not only on hay, but on all other articles of interstate commerce coming to that place, greatly to the detriment and disadvantage of that town and to the business of its merchants. The petitioner prayed that the notice required in such cases issue to said railroad, and that the Interstate Commerce Commission would order that the defendants cease from violations of the law in the particulars mentioned, and for such other and further relief as the commission might think proper.

The notice issued and the defendants duly appeared and filed their answers. The joint answer of the receivers of the East Tennessee, Virginia and Georgia Railway Co. and of the Memphis and Charleston R. R. Co. admits that such companies are subject to the act to regulate commerce, and in effect that the shipment of hay took place as set forth in the petition, but it was not admitted therein that the rates specified constituted a violation of the law, and proof of the same was demanded. The answer of the lessees of the Georgia R. R., as also the answer of the receivers of the South Carolina Railway Co., are in substance the same. Concerning the petitioner's allegations of a violation of the fourth section of the interstate commerce act, the answers make the following averments, in substance: That the Georgia R. R. Co. and the other carriers complained against have no joint through tariff from Memphis to Summerville, and that, therefore, they have no "line," in the sense of said section, from Memphis to Summerville on which that section can operate; that the transportation of the two car-loads of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, for the reason that Summerville is a local station on the

South Carolina railway, not on any water route, and that enterprise and capital has not constructed more than one railroad to it; that consequently it has not the advantage of competition of carriers, as the said railroad on which it is located is not compelled by competition to choose between a reasonable rate and a rate which is much below what is reasonable, and that at Charleston there exists competition with numerous other all-rail routes between Memphis and that city, eight of which are mentioned by name, and the lines composing the same set forth in detail. The claim was made by the defendants in their answers that all such lines were actual competitors for business from Memphis to Charleston; that Charleston was a port on the Atlantic coast, easy of access for vessels from Baltimore, Philadelphia, New York, Boston, and other eastern ports from which hay is shipped by water; that if the railroads running from Memphis to Charleston charged rates to all places as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be shipped from Memphis to Charleston, but the latter city would be supplied with hay from the North Atlantic ports, and said railroads would not only be deprived of such business, but that Memphis would lose the hay market; that the rates on western produce to Charleston and other coast cities are made with a view to actual existing water competition; that western produce, such as grain and hay, can be shipped from Chicago to Charleston, through the ports of New York, Philadelphia, or Baltimore, over continuous water routes by the lakes and canal or over combined rail and water routes; that the all-rail lines seeking to do business between Chicago, Charleston, and the coast cities are compelled to make their rates approximate those offered by the continuous water route or the combined rail and water routes; that the all-rail routes make their rates as much higher as the difference in services will permit, and those rates are correspondingly adjusted from all western points such as Evansville, Cairo, St. Louis, and Memphis, the present all-rail rates on hay per 100 pounds being as follows: From Chicago, 33 cents; from St. Louis, 28 cents; from Louisville, Evansville, and Cairo, 23 cents; from Memphis, 19 cents. The defendants claimed, therefore, that the rate from Memphis to Charleston on hay was forced upon their lines by actual existing water competition as well as by other additional competition beyond their control; that the controlling element in the said competition is the lake, canal, and ocean transportation between Chicago and Charleston, or the lake transportation from Chicago to Buffalo or other lake ports, thence by rail to New York, and thence by ocean to Charleston, or rail transportation from

Chicago to Baltimore, Philadelphia, or New York, and thence by ocean to Charleston.

The case being at issue upon the complaint and answers, the testimony having been duly taken, the same was, after argument by counsel, duly submitted to the commission, which directed the order to the appellees hereinbefore referred to, and, as required by law, it caused a properly authenticated copy of its report and of its findings of fact and conclusions thereon, together with a copy of said order, to be delivered to each and all of the parties to said cause, their receivers and successors in operation.

The defendants to said proceeding before the Interstate Commerce Commission having failed and refused to obey such order, the said Henry W. Behlmer filed his petition, as he was authorized by the interstate commerce law to do, in the circuit court of the United States for the district of South Carolina, in which the action had before the commission was fully set out and the refusal of the defendants therein to comply with what he charged to be the lawful order of the commission was alleged, and the prayer was made that an order be entered granting to the petitioner a writ of injunction restraining the defendants, their officers, servants, and attorneys, from continuing in their violation and disobedience to said order of the Interstate Commerce Commission, and that finally an order and decree be issued restraining the said defendants and each of them and their officers, servants, and attorneys from further violating or disobeying the requirements of said order of the commission and decreeing permanent obedience to the same, together with such further and additional orders as are usually entered under such circumstances.

The circuit court below, on the 2d day of November, 1894, directed that the defendants appear and answer said petition and show cause, if any they could, why the prayer of the same should not be granted.

The case was duly matured and came on to be finally heard on the 11th day of December, 1895, when after argument the court took the same under advisement, and afterwards, on the 22d day of January, 1896, entered a decree dismissing the bill. From this decree the petitioner appealed to the circuit court of appeals for the fourth circuit.

After hearing and full deliberation the court of appeals reversed the circuit court and entered a decree in accordance with the prayer of the bill on November 6, 1897.

On November 10, 1897, a petition for rehearing was filed by the railroads, and the same was refused January 20, 1898 (Trans., 154). The railroads then appealed to this court.

ASSIGNMENTS OF ERROR.

I.

That said circuit court of appeals erred in reversing and remanding the decree rendered in the above-entitled cause on January 22, 1896, by the circuit court of the United States for the district of South Carolina.

II.

That said circuit court of appeals erred in instructing said circuit court to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them under circumstances and conditions similar to those set out in the petition filed in this cause from Memphis, in the State of Tennessee, to Summer-ville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities respectively for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect and enforced as provided for in said act to regulate commerce, and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may under the circumstances of this case think proper and just.

III.

That said circuit court of appeals erred in decreeing that said appellees should pay the costs of said cause in said circuit court of appeals.

IV.

That said circuit court of appeals erred in not affirming said decree rendered in said cause January 22, 1896, by said circuit court of the United States for the district of South Carolina.

V.

That said circuit court of appeals erred because it failed to adjudge and decree that the matters of equity alleged in

the bill filed in the above-entitled cause are fully denied in the answer and are not sustained by the proof, and that said bill be dismissed.

VI.

That said circuit court of appeals erred because it in effect decided that the rates charged by the above-named appellees for the transportation of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, South Carolina, are unjust and unreasonable.

VII.

That said circuit court of appeals erred because it in effect decided that the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Summerville, South Carolina, is a like and contemporaneous service under substantially similar circumstances and conditions with the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Charleston, South Carolina.

VIII.

That said circuit court of appeals erred because it in effect decided that as the above-named appellees make a greater charge in the aggregate on hay and other commodities carried by them from Memphis, Tennessee, to Summerville, South Carolina, than they make on such freight from Memphis, Tennessee, to Charleston, South Carolina, they thereby give to Charleston, South Carolina, and its traffic an undue or unreasonable preference or advantage and subject Summerville, South Carolina, and its traffic to an undue or unreasonable prejudice or disadvantage.

IX.

That said circuit court of appeals erred because it in effect decided that the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, South Carolina, is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Charleston, South Carolina.

X.

That said circuit court of appeals erred because it in effect decided that the Interstate Commerce Commission has the power to fix the rates of transportation to be charged by the above-mentioned appellees for carrying freight from Memphis, Tennessee, to Summerville, South Carolina.

XI.

That the said circuit court of appeals erred in directing that a counsel fee should be paid to the counsel of appellant in said court, and in not deciding that the act known as the interstate commerce act, in so far as it directs the payment of a counsel fee to the successful party complaining against railroad corporations engaged as carriers of interstate commerce, while it provides for no similar counsel fee to such railroad companies in case judgment be in their favor, is unconstitutional and void, inasmuch as it deprives such railroad companies of their property without due process of law.

XII.

That said circuit court of appeals erred in not sustaining the decree of the circuit court dismissing the petition of appellant as against The South Carolina and Georgia Railroad Company, appellee, on the ground that the said company was not served with the order of the commission requiring said company to desist from charging any greater compensation in the aggregate for transportation of hay or other commodities from Memphis to Summerville than that contemporaneously charged and received from Memphis to Charleston.

XIII.

That the said circuit court of appeals erred in deciding that there was any proof whatever of the service of a copy of the order of the Interstate Commerce Commission made in said cause upon the appellee The South Carolina and Georgia Railroad Company, and in not deciding that it was beyond the power of the circuit court, after dismissing the petition of appellant, to alter, correct, or amend said decree after the term had expired in which the decree dismissing said petition was filed.

No. 244. 46

FILED

APR 1 1899

JAMES H. MCKENNEY,
Clerk.

Brief of Northrop for Appellee.

BRIEF FOR APPELLEE.

Filed April 1, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 244.

THE LOUISVILLE AND NASHVILLE RAILROAD
COMPANY ET AL., APPELLANTS,

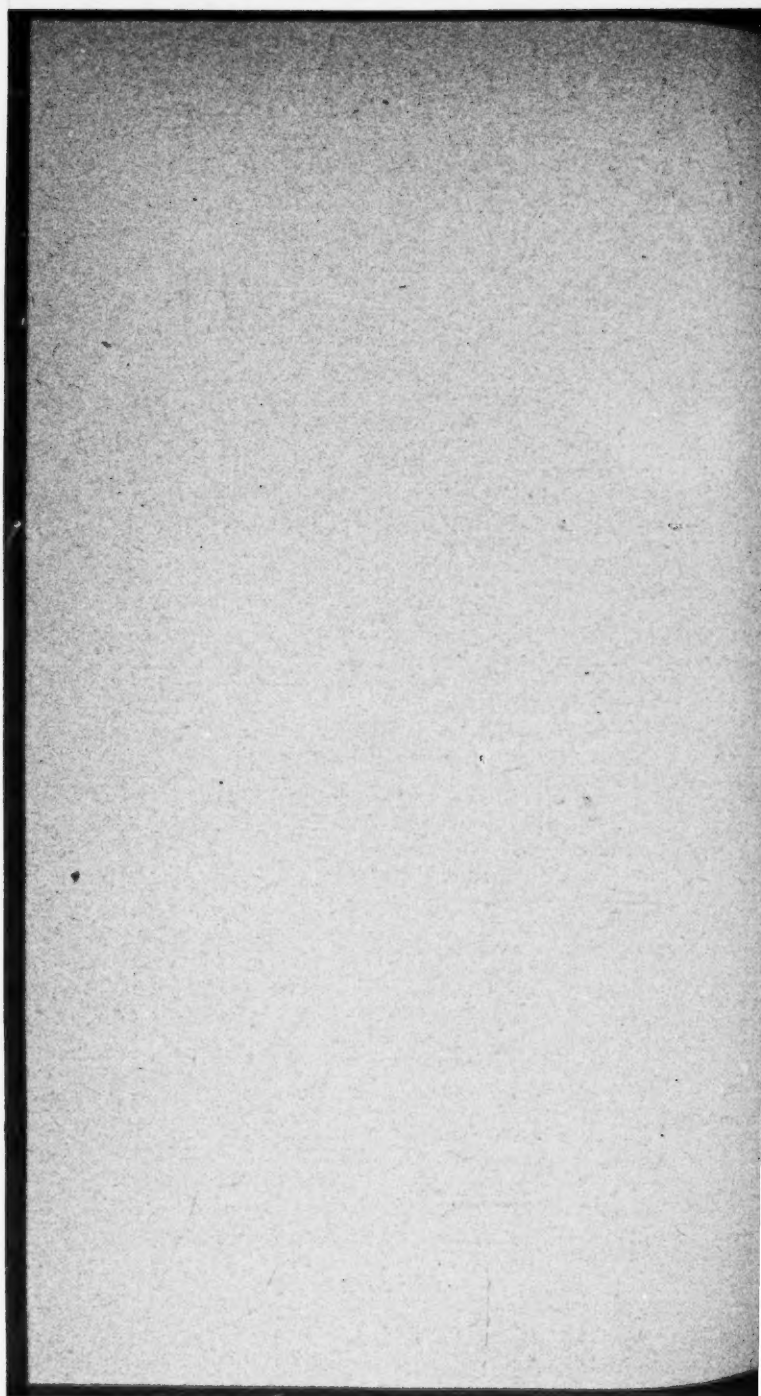
vs.

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.



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ERRATA.

On page 50 the sentence, “We now come to the question of carriers subject to the act,” should be on page 51, immediately preceding the head line.

On page 31 a typographical error has misplaced the word “law.”



XIV.

That said circuit court of appeals erred in reversing the decree of the circuit court which found that the appellee The South Carolina and Georgia Railroad Company was not bound by the proceedings before the Interstate Commerce Commission brought against D. H. Chamberlain, receiver of the South Carolina Railroad Company, unless proof was made of the service upon said appellant of a copy of the order of said Interstate Commerce Commission, and in deciding that the purchase at a foreclosure sale of the property of the South Carolina Railway Company by a committee of its mortgage bondholders, and the conveyance of said property to a new corporation, the South Carolina and Georgia Railroad Company, was a mere change of name.

ARGUMENT.

Stripped of formal phraseology, the foregoing assignments allege error in the rulings of the circuit court of appeals:

1. Because as matter of fact it found the long haul and the short haul in this case to have been made under substantially similar circumstances and conditions.
2. Because as matter of fact it held the rates complained of to be unreasonable.
3. Because as matter of fact it held that the rates in question are unduly prejudicial to Summerville and unduly preferential to Charleston.
4. Because it is alleged that said court in effect held that he commission has power to fix rates.
5. Because the successor to a receiver was held to be bound by proceedings before the commission to which he was a party.
6. Because a fee was ordered to be paid to the solicitor of appellee.

The questions thus raised will be discussed in the above order.

Taking up the first, therefore, as to the substantial similarity of the circumstances surrounding the hauls in this case, it is apparent that an infraction of the fourth section of the act to regulate commerce is involved.

In the last case decided by this court, *The Interstate Commerce Commission vs. The Alabama Midland Railway Co. et al.*, 168 U. S., p. 170, this court said:

"As the third section of the act, which forbids the making
"or giving any undue or unreasonable preference or advan-

"tage to any particular person or locality, does not define
 "what, under that section, shall constitute a preference or
 "advantage to be undue or unreasonable, and as the fourth
 "section, which forbids the charging or receiving greater
 "compensation in the aggregate for the transportation of like
 "kinds of property for a shorter than for a longer distance
 "over the same line, under substantially similar circum-
 "stances and conditions, does not define or describe in what
 "the similarity or dissimilarity of circumstances and con-
 "ditions shall consist, it cannot be doubted that whether,
 "in particular instances, there has been an undue or
 "unreasonable prejudice or preference, or whether the cir-
 "cumstances and conditions of the carriage have been sub-
 "stantially similar or otherwise, are questions of fact
 "depending on the matters proved in each case (*Denaby
 Main Colliery Company vs. Manchester Railway Co.*, 3 R'y &
 Can. Traffic Cases, 426; *Phipps vs. London & North Western
 R'y*, 1892, 2 Q. B. D. 229; *Cin. N. O. & Tex. Pac. R. vs. Interstate
 Com. Com.*, 162 U. S., 184, 194; *Texas and Pacific Railway
 vs. Interstate Com. Com.*, 162 U. S., 197-235). "

It is conclusively settled, therefore, that each case must
 turn upon its own circumstances, and it is purely a question
 of fact as to whether or not the circumstances involved in
 any particular case are substantially similar or dissimilar.

How this question of fact should be determined was also
 conclusively settled in the same case.

After reviewing all the previous cases this court says:

"Accordingly our conclusion is that it was competent, in
 "the present case, for the circuit court, in dealing with the
 "issues raised by the petition of the commission and the
 "answers thereto, and for the circuit court of appeals on
 "appeal, to determine the case upon a consideration of the
 "allegations of the parties and of the evidence adduced in
 "their support, giving effect, however, to the findings of fact
 "in the report of the commission as *prima facie* evidence of
 "the matters therein stated.

"It has been uniformly held by the several circuit courts
 "and the circuit courts of appeal, in such cases, that they
 "are not restricted to the evidence adduced before the com-
 "mission, nor to a consideration merely of the power of the
 "commission to make the particular order under question,
 "but that additional evidence may be put in by either party,
 "and that *the duty of the court is to decide, as a court of equity,
 "upon the entire body of the evidence*" (*I. C. C. vs. Alabama
 Midland R'y Co.*, 168 U. S., p. 175). (*Italics mine.*)

In the case at bar the circuit court of appeals has per-
 formed its full duty and decided this fact as to the similarity

of the circumstances upon the entire body of the evidence. A brief review of the proceedings below shows this.

The contention of the roads was the usual one, namely, that competition made the circumstances dissimilar. It was argued on their part that competition by water and competition by other rail lines and competition of other markets, all of which reduced themselves to the mere fact of competition, constituted and made out substantially dissimilar circumstances and conditions within the meaning of the act to regulate commerce, and the evidence was fully reviewed by counsel for the roads.

On behalf of Behlmer it was said:

The inquiry presented now is, does competition constitute substantially dissimilar circumstances and conditions?

The only answer to this is that it depends upon circumstances. This reply seems neither very wise nor very deep but it is very true.

It depends on what is meant by competition, or the kind of competition, or the force of competition, no matter what the kind may be, if that method of stating it be preferred.

Let us illustrate. Suppose that instead of being unsuccessful, the effort to show a line of ships plying from Charleston down the Atlantic across the Gulf and up the Mississippi to Memphis had prevailed.

These vessels could not compete with the rail lines in carrying strawberries to Memphis from the Charleston truck farms. No strawberries could go by water; they would perish *en route*. So as to freight like strawberries, there could be no water competition between Charleston and Memphis, and the railroads could fix their own rates on this article of commerce.

But on phosphate rock the vessels could make rates, and if they sailed regularly and often there would be forcible competition on this article. But if one steamer a month or one only every two months sailed, the competition would not be of sufficient force to have an effect on the rail lines.

A good illustration of this is seen in the traffic between Chicago and New York city. When the lakes are open the rail rates go down, but for six months in the year, when ice stops navigation, the rail rates go up. Wagon or stage competition to Memphis would be equally inefficient against railroads, for, as said by the Supreme Court, "the demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation" * * * (162 U. S., 210).

So when we go to the law for the rule we find it laid down with clearness and precision and in accordance with reason and common sense.

The Supreme Court does not say that competition regardless of its character or extent, is to be considered in construing the circumstance phrase; it very tersely and accurately says, "Competition that affects rates should be considered" (see Import Rate case, 162 U. S., 233), and in the Phipps case Wills, J., uses an accurate expression and not loose language. He says: "Although *effective* competition with another railway or canal company will not of itself justify a preference which is otherwise quite beyond the mark, yet still it is not a circumstance that can be thrown out of the question, and I think there is abundance of authority for that" (Phipps vs. London & Northwestern Railway, 2 Q. B. D., 1892, 229). (*Italics mine.*) This language is quoted by the Supreme Court in the Import Rate case (162 U. S., p. 224).

And the commission, from the very first case up to the present time, has stated the same thing and adjudged it in numerous cases. Judge Cooley *in re* the L. & N. petition laid it down:

"That the existence of actual competition, which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than the shorter haul" (1 I. C. C. Rep., 32).

The law, then, is clear and settled by the highest authority, and there is no dissonance in the decisions.

What are the facts in this case and do they establish "effective competition;" "competition that affects rates;" "actual competition which is of controlling force in respect to traffic important in amount"?

The evidence was then fully reviewed by counsel for Behlmer. Both parties recognized that this court had in the "Import Rate case" (Texas Pacific Railway Company vs. Interstate Com. Com., 162 U. S., 197) laid down the law for this country, and definitely and conclusively decided that "competition that affects rates should be considered."

In view of this, after arguing the evidence in the fullest possible manner, counsel for both sides in briefs expressly requested the circuit court of appeals to find on this matter of competition, and in the language of the counsel for the roads it was asked "in its opinion or decree to set forth the facts as found by it with reference to the competition upon which the appellées rely and as to whether it is such as affects rates.

CIRCUIT COURT OF APPEALS FINDS AS MATTER OF FACT FROM "ENTIRE BODY OF EVIDENCE" THAT CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY SIMILAR, AND ADOPTS SAME FINDING OF COMMISSION. SUPREME COURT WILL NOT DISTURB.

In response to the above-mentioned request of counsel on both sides and in pursuance of its duty "to decide as a court of equity upon the entire body of evidence" (168 U. S., 175), the circuit court of appeals found the facts clearly, distinctly, absolutely, and conclusively as follows:

"The appellees (the railroads) alleged, both before the commission and the court below, such substantial dissimilarity of circumstances and conditions as justified them in making the greater charge for the shorter haul complained of in the petition, and upon them was the burden of showing affirmatively that such circumstances and conditions were in fact substantially dissimilar. The commission in ascertaining the facts found against this claim of the railroad companies, &c." (Trans., 130; 42 U. S. App., 581).

Continuing, the circuit court of appeals says:

"* * * We have now to determine whether or not the facts found by the commission are supported by the evidence taken in this case, or, in other words, whether or not the circumstances and conditions attending the transportation of hay from Memphis to Summerville are so dissimilar as to justify the rates charged, respectively. Does the competition set up by the appellees (the railroads) as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions within the meaning of the said fourth section of the act to regulate commerce? Did such competition in fact affect rates between Chicago, the North Atlantic ports, and Charleston? We are of the opinion that it was not of controlling force; that it was not such effectual competition as would constitute the dissimilar circumstances and conditions which would justify the commission, upon application to it, in authorizing the carrier to charge less for the longer than for the shorter haul" (Trans., p. 131; 42 U. S. App., 581).

Again, the court says further on in its opinion:

"The rate from Memphis to Charleston on hay and grain and like products is reasonable, and is shown by the evidence to be remunerative; it is fair to presume that it

"would not have been made by the railroads, unless those
 "controlling them were satisfied that it would be so, and,
 "consequently, to justify the higher charge for the shorter
 "haul to Summerville, *which, we have found, was made under*
 "*substantially similar circumstances and conditions*, the com-
 "mission, after application to it for that purpose, must find
 "certain reasons for the same, after due investigation, that
 "may in fact exist, but which, we are compelled to say, are
 "not now disclosed by the record before us. In the light of
 "the act to regulate commerce, and keeping in view the
 "theory upon which it was constructed, it is not difficult to
 "understand why application was not made to the commis-
 "sion for permission to charge less for the longer haul to
 "Charleston than for the shorter haul to Summerville, when
 "the rate proposed was 19 cents per 100 pounds for the
 "longer and 28 cents per 100 pounds for the shorter" (pp.
 132, 133, Trans.; 42 U. S. App., 581. *Italics mine*).

Again:

"Finding the facts to be as above indicated, substantially
 "as found by the Interstate Commerce Commission in the
 "proceedings instituted before it" * * * (Trans., 133.)

These extracts show beyond doubt that after the fullest consideration of all the evidence the circuit court of appeals decided and determined that as a matter of fact the circumstances and conditions were similar and that it adopted the same findings of fact made by the commission, and it held with the commission that the competition set up by the roads was not effective; that it did not affect rates, nor was it of controlling force.

Findings of fact such as these where two courts have concurred or where the conclusions of a master or an independent tribunal or commission have been adopted by a court are held to be binding on this court and conclusive, and, in the language of Mr. Justice Brown, "so far as there is any testimony consistent with the finding, it must be treated as unassailable."

Davis vs. Schwartz, 155 U. S., 636.

Wiscart vs. D'Auchy, 3 Dall., 321.

Bond vs. Brown, 12 How., 254.

Graham vs. Bayne, 18 How., 60-62.

Norris vs. Jackson, 9 Wall., 125.

Ins. Co. vs. Folsom, 18 Wall., 237-249.

The Abbotsford, 98 U. S., 440.

Crawford vs. Neal, 144 U. S., 585.

Turner vs. Ferris, 145 U. S., 132.

Evans vs. State Bank, 141 U. S., 107.

Kimberly vs. Arms, 129 U. S., 512.

Morewood vs. Enequist, 23 How., 491.

The Ship Marcellus, 1 Black, 414-417.

Dravo vs. Fabel, 132 U. S., 487-490.

Companie de Navigacion vs. Brauer, 168 U. S., 104-123.

The Richmond, 103 U. S., 540.

The Conqueror, 166 U. S., 110-136.

Stuart vs. Hayden, 169 U. S., 14.

Baker vs. Cummings, 169 U. S., 198.

Justice Jackson in *K. & I. Bridge Co. vs. L. & N. R. R. Co.*, 37 F. R., p. 613, said :

"The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by law, the commission may be regarded as the general referee of each and every circuit court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the act."

The eminent personnel of the commission, frequently commented upon by this court, makes them, however, far superior to any ordinary master or referee in chancery, and findings of fact made by them are entitled to greater weight, and the rule of this court laid down in so many cases is thus strengthened and reinforced, and this court will not disturb a finding of fact concurred in by the circuit court of appeals and the commission.

Such has been the invariable course of this court in every case of the sort so far brought before it.

The cases are all reviewed in the Alabama Midland opinion (168 U. S., pp. 174-185), and that case itself is an authoritative illustration of the operation of the rule, for this court refused to interfere with or disturb the facts as found by the two lower courts, although, as Mr. Justice Shiras noted, much conflicting evidence was encountered.

Amongst other authorities cited in the Alabama Midland decision is one that is on all fours with the case at bar and decisive of it. This is the famous "Social Circle case," reported in the books as *Cinn., N. O. and Texas Pacific R. W. Co. vs. I. C. Com.*, 162 U. S., 184.

The situation in the Social Circle case was precisely the same as the situation in the case at bar, save that for certain reasons the present case is stronger.

In the Social Circle case the commission ruled against the railroads.

In the case at bar the commission ruled against the roads.

In the Social Circle case the circuit court overruled the commission.

In the case at bar the circuit court overruled the commission.

In the Social Circle case the circuit court of appeals reversed the circuit court by a general decree, no opinion being filed.

In the case at bar the circuit court of appeals reversed the circuit court and filed an opinion expressly finding facts and adopting the findings of the commission in the most distinct and emphatic manner. A rehearing was asked for and refused.

So the situation is precisely the same in both cases, except that the present case is stronger and clearer on account of the opinion being filed and the rehearing being refused.

Mr. Justice Shiras in the Alabama Midland opinion thus describes the action of the Supreme Court in the Social Circle case. He says:

"In the case of Cincinnati, N. O. and Texas Pacific R. W. Co. vs. I. C. Com. (162 U. S., 184) the findings of the commission were overruled by the circuit court, after additional evidence taken in the court, and the decision of the circuit court was reviewed in the light of the evidence and reversed by the circuit court of appeals, and this court, in reference to the argument that the commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that as the question was one of fact, peculiarly within the province of the commission, and as its conclusions had been accepted and approved by the circuit court of appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the circuit court of appeals should be affirmed" (168 U. S., 174, 175).

It seems conclusively settled, then, that this court will not disturb findings of fact concurred in by the circuit court of appeals and the commission, and that "so far as there is any testimony consistent with the finding it must be treated as unassailable."

**ALL THE TESTIMONY FULLY SUSTAINS THE
CIRCUIT COURT OF APPEALS AND THE COM-
MISSION, AND THERE IS NO CONFLICT OF EVI-
DENCE.**

For the convenience of this court all the testimony on this question of competition will be now set out.

Before doing this, however, we must ascertain the issues,

for this court has said in the "Import Rate case," 162 U. S., 238: "The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all the facts *duly alleged and supported by competent evidence.*" * * * (*Italics mine.*)

In reviewing this Import Rate case, in the Alabama Midland decision (168 U. S., 175), the language of this court is:

"So, in the case of Texas and Pacific Railway Company vs. Interstate Com. Com. (162 U. S., 197), the decision of the circuit court of appeals, which affirmed the validity of the order of the commission upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that, in the case under consideration, the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the circuit court had no jurisdiction to consider the evidence and thereupon to affirm the validity of the order of the commission, but because that issue was not actually before the court, and no testimony had been adduced by either party on such an issue." * * *

These announcements make it clear that the courts can only act upon issues duly alleged, and can only consider "competent testimony." Hence the necessity of ascertaining the issues.

At page 5, Trans., appears the detailed allegations of Behlmer charging a violation of section 4 of the act to regulate commerce, and the disobedience of the commission's order to cease and desist.

At page 33, Trans., in their joint and several answer, section 11, the railroads admit the willful disobedience of such order.

They set up in justification:

1. Competition by rail from Memphis (Trans., p. 35).
2. Competition by water—lake, canal, and ocean—from Chicago, and by ocean from North Atlantic ports (Trans., p. 39).
3. Competition between market and market (Trans., pp. 38, 39).

These are the only "facts duly alleged," and they constitute all the issues on the question of competition. It is important to keep this in mind, for at page 56, Trans., it appears that the railroads attempted at the hearing before the commission to prove water competition between Memphis and Charleston by way of the Mississippi river, the gulf of Mexico, and the Atlantic ocean, thus showing competition between the point of shipment and the point

of destination. As soon as this attempt was made, counsel for Behlmer objected on the ground that no such defense was set up in the answer, and petitioner was therefore wholly unprepared on this point because no notice thereof had been given in the answer. Mr. Baxter immediately acknowledged the truth of this and said he would amend his answer if he could make the proof. The answer was never amended either before the commission or before the courts, so the point was abandoned.

Thus by the decisions of this court and as a matter of fact the only issues are the three above mentioned.

With this prelude and the additional remark that the burden of proof in establishing a justificatory defense and of facts peculiarly within one's knowledge is on the person setting up such defense or relying on such facts (139 U. S., 560), we now set forth all the evidence in the record bearing on these defenses.

At pages 55 and 56, Trans., we find the testimony of Mr. Jackson, a traffic manager and witness for the roads:

"Mr. BAXTER: I would like to know what all-rail lines, if any, actually compete for traffic between Memphis and Charleston?

"Mr. JACKSON: Initial lines?

"Mr. BAXTER: Yes, sir.

"Mr. JACKSON: The Memphis and Charleston and its connections, the Louisville and Nashville and its connections, the Kansas City, Memphis and Birmingham and its connections, and the Illinois Central and its connections.

"Mr. BAXTER: Are any one of those four initial lines at Memphis in anywise controlled or managed by the others?

"Mr. JACKSON: No, sir.

"Mr. BAXTER: You say they actually compete?

"Mr. JACKSON: Unless you consider that the Louisville and Nashville has some control of the Georgia railroad.

"Mr. BAXTER: You mentioned four initial roads and did not mention the Georgia railroad. Have any of those four initial lines any control or management over the others?

"Mr. JACKSON: No, sir.

"Mr. BAXTER: You say those four lines out of Memphis actually compete for the traffic. Do you mean they offer to compete or actually carry traffic?

"Mr. JACKSON: Actually carry traffic.

"Mr. BAXTER: They all compete at agreed rates?

"Mr. JACKSON: Yes, sir.

"Mr. BAXTER: How are those rates agreed upon?

"Mr. JACKSON: They are rates that are established or made by the rate committee of the Southern Railway and Steamship Association.

"Mr. BAXTER: Those four initial lines are all members of that association.

"A. Yes, sir.

"Q. So the way they are agreed upon is through the representatives of those four lines on the rate committee of the Southern Railway and Steamship Association?

"A. Yes, sir."

Competition down the Mississippi and by ocean *via* New Orleans is then attempted to be proved, but witness does not know of any charter rates on hay or grain by sea from New Orleans (Trans., p. 56).

(Trans., pp. 57, 58:)

"Q. What rates have been obtained on hay from Chicago to Charleston *via* the lakes, canal and ocean?

"A. I have been shown an invoice in which a rate of 23 cents was granted from Chicago to Charleston. * * *

"The invoice I saw was on a shipment of corn from Chicago to Charleston, sold and delivered to the party at Charleston, and from the invoice was deducted a rate of 23 cents, and, under the name of the concern, the rate was shown, 23 cents per hundred pounds, *via* the W. T. Co. and Clyde line."

P. 58:

"Q. When the lakes are open, what proportion of business from Chicago to Charleston comes by water and rail lines?

"A. I am not able to state the proportion of business. I can only state, in a general way, that the business *via* the all-rail lines is materially affected by that movement. * * *

"Q. Please refer to page 5, Mr. Jackson, and state what the all-rail rate on class D is from Chicago *via* Ohio River points to Charleston?

"A. 33 cents.

"Q. What is the all-rail rate on 6th class, which, I understand, includes hay, from Chicago to New York?

"A. 25 cents.

"Q. What is the all-rail rate from Chicago to Baltimore on same class?

"A. I am informed it is 22 cents. My recollection is that there is a differential of 3 cents on the rates from Chicago to New York, and the rates from Chicago to Baltimore, I am informed, is 22 cents.

"Mr. BAXTER: What rates are charged by schooners from Baltimore to Charleston on class D?

"Mr. JACKSON: Mr. Molony stated to me distinctly yester-

day that he had brought in cargoes of grain from Norfolk and Baltimore by schooner at 2 cents per bushel—equal to about 4 cents per hundred pounds.

"Mr. BAXTER: If that be so, from Chicago to Charleston via Baltimore, a rate can be obtained by rail and schooner on hay of 26 cents a hundred pounds?

"Mr. JACKSON: Yes, sir.

"Mr. BAXTER: Do you know what the rail and water rate on class D is from Chicago to Baltimore?

"Mr. JACKSON: I am informed they have a 12 cent rate.

"Mr. BAXTER: By taking the rail and water rate from Chicago to Baltimore and adding the schooner rate from Baltimore to Charleston, a rate of 16 cents on hay and grain can be obtained from Chicago to Charleston?

"A. Yes, sir."

At page 59, Trans., witness says the price of hay in New York on a given date is \$15 per ton and in Memphis \$12.75 per ton, and the rate on the Clyde line is \$1.60 per ton and the rate from Memphis all rail to Charleston is \$3.80 per ton on this class, and that the rates to Charleston from Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, and Paducah are 23 cents per 100 pounds; from St. Louis and East St. Louis, 28 cents; from Memphis, 19 cents. Rates from Cairo, East Cairo, Belmont, and Columbus to Charleston are 23 cents.

Witness, at page 60, says these rates bear certain relations to rates from Chicago to Charleston, and if this relation were changed, in his opinion, the grain and hay would move to the North Atlantic ports and come south by coastwise vessels.

At page 61, Trans., he says that between Augusta and Charleston the Port Royal and Augusta railroad and the Savannah and Charleston compete for the business with the South Carolina and Georgia, and there is only ten miles difference in distance over this route.

At pages 62 and 63, Trans., cross-exam., Mr. Jackson says:

"Mr. NORTHROP:

"Q. Are there any shippers taking grain or hay from Memphis to New Orleans and carrying it from New Orleans by water to Charleston? If so, mention the lines and shippers.

"A. I do not know of any actual movement.

"Q. Do you know any actual shippers or purchasers who convey freight of this class D through from Chicago over the lakes and canals and down by the sea to Charleston?

"A. Not of my own knowledge.

"Q. You have not heard of any considerable movement of grain or hay to Charleston that way?

"A. Yes, sir.

"Q. Large shipments?

"A. Yes, sir. I was informed by a heavy grain dealer in Charleston that over a year ago there were more than 1,100 cars of grain, flour and hay.

"Q. Do you know of any such shipment in existence at present?

"A. No; I do not know of any just now.

"Q. Then there is no large movement or any movement of considerable extent of grain and hay from Chicago *via* the lakes and by sea to Charleston now?

"A. I do not know of any at the present time.

"Q. You have made it a subject of inquiry?

"A. Yes, sir; I do not suppose there is any movement just now.

"Q. So you do not think there is any actual competition by water from Chicago to Charleston?

"A. I do not understand that movement is necessary to produce competition; the existence of the rate produces it.

"Q. There cannot be any competition unless the stuff is carried. All these four competing railroads are subject to the provisions of the act to regulate commerce, are they not? They carry the traffic between different States?

"A. Oh, yes, sir.

"Q. All belong to the Southern Railway and Steamship Association?

"A. Yes, sir.

"Q. There is no competition among these roads; all have the same rates?

"A. All those initial lines work the same rates between the same points.

"Q. There is no cutting of rates between them?

"A. I do not know.

"Q. Is not this grain and hay that comes from New York, for instance, raised in the West and then brought to New York for shipment by sea, most of it?

"A. You mean the hay and grain that comes into this territory?

"Q. Yes, sir.

"A. Yes, sir; I will say that the grain was raised in the western grain places.

"Mr. NORTHROP: Do you know of any existing steamship lines or other water carriers from Baltimore to Charleston conveying this grain in large quantities or to any considerable extent?

"Mr. JACKSON: No, sir; I am not personally familiar with the lines in the grain business.

"Mr. NORTHROP: You do not know of any?

"Mr. JACKSON: No, sir.

"Mr. NORTHROP: You have made inquiry?

"Mr. JACKSON: Yes, sir; I have made inquiry."

On redirect examination, at pages 63, 64, Trans., he says there is "some eastern hay," but the hay from Memphis is raised in Missouri and Illinois; that tariffs do not indicate movement, and that competition commences right on the farms, some lines *via* Ohio river and some *via* Chicago.

At page 65, Trans.:

"Commissioner KNAPP: Is there considerable movement of hay and grain from Memphis to Charleston?

"Mr. JACKSON: Very considerable; yes, sir.

"Commissioner KNAPP: Can you give any idea of the amount during any given period of time?

"Mr. JACKSON: No, sir; no definite idea.

"Commissioner KNAPP: More or less of that traffic is moving all the time?

"Mr. JACKSON: Yes, sir."

At page 66, Trans., Mr. Waring, a traffic manager and witness for the roads, says:

"Question No. 10. What is the rate on grain and hay from Chicago via the Erie canal and New York to Charleston?

"Answer. Have no knowledge.

"Question No. 11. What is the rate on this class of freight from Boston to Charleston?

"Answer. 20 cents per 100 pounds.

"Question No. 12. From New York to Charleston?

"Answer. 14 cents per 100 pounds.

"Question No. 13. From Philadelphia to Charleston?

"Answer. 14 cents per 100 pounds.

"Question No. 14. From Baltimore to Charleston?

"Answer. No steamer line from Baltimore to Charleston. Rail and water rate via Virginia ports, 17 cents per 100 pounds."

At page 69 witness says:

"Q. Is there any actual grain coming in here now by way of water from Chicago in large quantities?

"A. I don't think so. * * *

"Q. You do not know whether there is any handled by water to Charleston?

"A. I could not answer that positively. There is from time to time an amount of baled hay and grain *via* the Clyde steamship line from New York to Charleston; but as to the origin of that grain I do not know.

"Q. Is it very large?

"A. No, sir; very small."

Mr. Kracke, a large grain dealer in Charleston for 30 years, at page 70 says:

"Q. How does it (grain) reach here now; all rail?

"A. All rail; yes, sir."

He goes on to say no hay or grain comes to Charleston by water from Memphis, and he has never heard of any coming that way.

At pages 70, 71, cross, he says:

"Q. What is the price of hay in Chicago?

"A. I really don't know. I have not sold a bale of hay in that country for a long time. Hay that comes from Memphis is raised in Missouri.

"Q. Don't you know of shipments of grain from Chicago *via* the lakes and canals to New York, and thence by steamer or vessel to Charleston?

"A. I have heard of them, sir; I think about 4 years ago. The prices in Chicago do not justify that now. They are too high in Chicago now. * * *

"Q. I am requested to ask you if last winter there were not some cargoes of grain brought here from Virginia ports.

"A. I think last summer one or two cargoes were brought here.

"Q. From what point?

"A. Norfolk.

"Q. Did that originate there, or where was it grown?

"A. Up in that vicinity, I suppose.

"The CHAIRMAN:

"Q. Where did you say?

"A. Norfolk, Virginia.

"Mr. NORTHROP:

"Q. Does very much of this Virginia grain come to this market, Mr. Kracke?

"A. Not very much. Sometimes large volumes come from the West.

"Q. Maine and Virginia do not play a very large part, do they?

"A. No, sir."

At page 75, Trans., General Manager Ward, S. C. R. R., a witness for the road, says :

"Commissioner KNAPP :

"Q. A large proportion of your business is bringing this hay and grain from the West?

"A. Nearly all of our east-bound business is that."

At page 74, Trans., he says :

"Well, three-fourths of our business is that kind of freight. I think that would be the average freight. I can tell you what an immense tonnage of hay we haul. We haul 9,600,000 pounds of hay. So you see it is quite an item in our business."

At pages 75, 76, 77, Trans., Mr. Molony, a witness for the roads, a grain dealer in Charleston, says he has brought one shipment of grain by rail, lake, and ocean to Charleston at 23 cents per 100 pounds. Ocean shipment was by Clyde steamship line; that he has not bought any grain or hay in Chicago for sixteen months, and that he can get a schooner rate from New York on hay of 8 cents per hundred; never heard of any hay or grain coming from Memphis to Charleston by water; says he generally buys west; that ordinarily the prices are better in the West than in the East, and he would look to the cheaper market. The average difference in price would be \$3.50 per ton in favor of Memphis over New York."

At page 86, Trans., Theo. Nathan, a witness for the roads and a grain dealer, says :

"By far the greater part of grain and hay that comes to Charleston comes directly from the West by rail."

This testimony clearly establishes that at Charleston there is no "competition that affects rates," to use the language of the Supreme Court. We will now analyze this testimony:

THE ALLEGED COMPETITION BY RAIL DOES NOT "AFFECT RATES."

All the alleged rival rail lines are proved to be members of the Southern Railway and Steamship Association (Trans., pp. 55, 56, 95), and they all abide by the rates this association fixes. How can competition affect rates agreed upon beforehand?

The agreement here is not to compete. The rates by the rail lines are the same for all lines, and are made by a rate

committee or commissioner appointed to act for them. None of them will carry a ton for less than the rate agreed upon, so none of them are ever called upon to meet competition between themselves that "affects rates." They are in fact but one organization, and one rate is made for the whole. We have said it is an agreement not to compete, and this is clearly established.

At page 98, Transcript, we find in article 13 of the "agreement of the Southern Steamship & Railway Association" that the commissioner "shall also have authority to reduce the rates when necessary to *meet the competition of lines or roads not parties to this agreement, and of lines parties to this agreement, when such lines fail to maintain the rates as established under the agreement*, and he may at the same time make corresponding reductions from other points from which relative rates are made." (Italics mine.)

At page 101, Trans., we find, in article 23, sec. 2:

"It is distinctly understood and agreed that the maintenance of rates, as established under the rules of the association, is of the very essence of this agreement, and the parties hereto pledge themselves to maintain them and to require all their connections to maintain such rates, and in the event of any company or line or its connections not members of the association failing to conform to this obligation, the other parties in interest pledge themselves to increase their proportions of through rates sufficiently to protect the authorized rates, and to apply full local rates upon all traffic, subject to the association agreement, coming from or going to such *offending lines*, whenever required by the commissioner to do so." (Italics mine.)

Then follows a provision as to penalties to be imposed for the "offense" of competing, and as the roads are required to deposit amounts, not less than \$500 nor more than \$5,000, these penalties can be promptly collected.

In the face of this agreement, we say it is an insult to our intelligence to assert that any "competition that affects rates" can exist between the parties to it.

The "maintenance of rates as established under the rules of the association is of the very essence of this agreement," and rates are only to be reduced "when necessary to *meet the competition of lines or roads not parties to this agreement, and of lines parties to this agreement when such lines fail to maintain the rates established under this agreement*." Whoever drew that agreement is entitled to credit for a clear and cloudless style. No room is left for doubt here. The "offense" of competition is punishable

"by fine," and the lash of "full locals" is to be also applied to a recalcitrant.

But the effect of agreements such as these is no longer an open question, and it has been conclusively settled by this court that they eliminate and destroy competition.

At the present term this court construed a traffic agreement far less strong in its terms than the one in this case, and held absolutely that it stifled competition. Mr. Justice Peckham, speaking for the court, said :

"The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several States, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects, and, of course, is intended to affect, the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. The agreement affects interstate commerce *by destroying competition* and by maintaining rates above what competition might produce."

U. S. vs. Joint Traffic Ass., 171 U. S., 568, 569. (Italics mine.)

Again :

"Under these circumstances the agreement, taken as a whole, prevents and was evidently intended to prevent, not only secret but any competition" (171 U. S., 564).

Again :

"The natural, direct and necessary effect of all these various provisions of the agreement is to prevent any competition whatever between the parties to it for the whole time of its existence. It is probably as effective in that way as would be a provision in the agreement prohibiting in terms any competition whatever" (171 U. S., 565).

Again :

"Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination

"among them by means of which competition is to be smothered" (171 U. S., 570).

Again :

"We think it extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition" (171 U. S., 570-571).

To same effect see *U. S. vs. Trans-Missouri Freight Ass.*, 166 U. S., 290.

It is clear, then, that traffic agreements such as the one in the case at bar wholly smother and destroy competition, and that roads which are parties to such agreements are not competing roads, but "one consolidated and powerful association." Hence in this case all the alleged rival lines being members of the Southern Railway and Steamship Association and parties to the agreement, they are not competitors, and the claim that their rates are affected by competition is without foundation, for competition has been totally destroyed by convention.

This alleged terrific competition between railroads under agreement not to compete recalls a speech of Mr. Gladstone, made in 1844 before Parliament, reported in the third person according to the English style: "It was said let matters go on as at present and let the country trust to the effects of competition. Now, for his part, he would rather give his confidence to a Gracchus, when speaking on the subject of sedition, than give his confidence to a railway director, speaking to the public of the effects of competition—railway companies were singularly philanthropic among themselves. Their quarrels were lovers' quarrels, and they reminded him of a quotation once felicitously made use of by Mr. Fox, '*Breves inamicitiæ, amicitia sempiternæ*'" (Hansard's Debates, third series, volume LXXVI, p. 500).

The evidence, therefore, conclusively supports the finding

of fact made by the circuit court of appeals, concurring with the commission, that the competition set up between alleged rival rail lines was not such as to "affect rates;" hence, in the language of this court, as there is "testimony" consistent with the finding, it must be treated as unassailable" (155 U. S., 636, and cases hereinbefore cited).

This brings us to the next question of fact, namely, water competition.

THE ALLEGED COMPETITION BY WATER DOES NOT "AFFECT RATES."

As to the water competition, none from Memphis to Charleston has ever been heard of, and that contention was abandoned by the roads (Trans., p. 56). Mr. Jackson says no large movement of grain or hay exists from Chicago by lake, canal, or ocean to Charleston. Mr. Waring says the same thing. Mr. Molony sixteen months before the hearing made one shipment that way. Mr. Kracke does not even know the price of hay in Chicago, it has been so long since he purchased any there. Maine and Virginia hay play no part in this market. Mr. Molony says he does not buy from Baltimore, but has shipped by the Clyde line from New York once or more than once. They all unite in saying that they principally buy from the West and that these articles consumed in this territory are chiefly, if not wholly, grown in the West—Kansas, Missouri, and Illinois.

General Manager Ward says nearly all the east-bound business of the South Carolina road consists of this traffic.

"I can tell you what an immense tonnage of hay we have. We haul 9,600,000 pounds of hay."

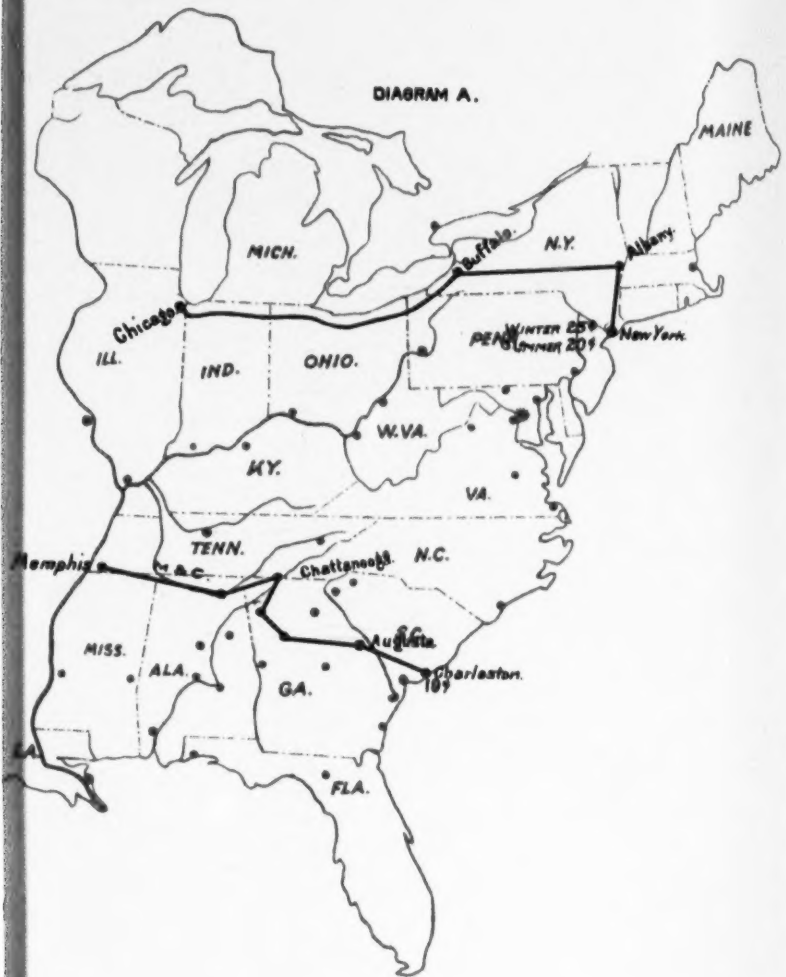
Mr. Nathan says it mostly comes all-rail from the West. In fact the testimony is unanimous on this point.

In the face of all this can it be contended that there is any "effective competition" by water?

Not a single witness testifies that he has ever himself shipped nor has he any personal knowledge of any shipments from Baltimore and Norfolk. The most that we get from the testimony is that such shipments have been vaguely heard of. Four grain dealers out of the five doing business in Charleston were examined—Kracke, Molony, Nathan, and Jones—and not one has said he ever shipped a bale of hay or a pound of grain from Norfolk or Baltimore, and out of all these Molony is the only one who says he shipped from Chicago, and that was sixteen months ago. Even in this he has vague recollections and says it was brought by the Clyde line, which is a member of the Southern Railway and Steamship Association, pledged under



DIAGRAM A.



penalty to maintain its rate of 14 cents from New York (Trans., p. 95).

By article 12 of that document they "agree to protect the "water lines or combined water and rail lines," and *vice versa*. He says he can get a schooner rate of 8 cents per hundred from New York; but it is significant that he omits to assert that he ever did, and that he tells us the one Chicago shipment he made came by the Clyde steamship line (Trans., pp. 76, 77). He distinctly says he principally buys west, because the prices are better.

The burden of proving competition of controlling force and important volume, actually existing and not mythical and chimerical, was on the roads. All the testimony proves the very opposite, and the finding of the circuit court of appeals is fully sustained by the evidence.

The following diagrams, "A" and "B," clearly illustrate the inefficiency of the water competition set up in this case, namely, that from Chicago and that from North Atlantic ports, no other water competition being alleged in the pleadings or put in issue.

WATER COMPETITION FROM CHICAGO DOES NOT "AFFECT RATES" FROM MEMPHIS.

Defendants say water competition from Chicago *via* the lakes, canal, Hudson river, and ocean force the rate from Memphis to Charleston down to 19c. If this be true, how can the roads that run along the very margin of the lakes to New York city maintain a rate of 20c. per 100 lbs. when the lakes are open, and 25c. per 100 lbs. when the lakes are closed? (Trans., p. 90.)

They must prove "competition that affects rates." If the rail rates between Chicago and New York are not affected by the water competition between those points so as to fall below 20c. or 25c., can it be that the rates between points 800 or 900 miles distant from lake and canal feel it to a more terrific extent than these points themselves? Does this competition gather momentum with the distance?

This contention is clearly untenable, and the fact that the all-rail rates between Chicago and New York are not forced down below 20c. or 25c. proves beyond question that water competition from Chicago does not affect the all-rail rates between Memphis and Charleston. Surely it does not for six months when the lakes are closed.

It is a theory and not a condition that confronts us.

WATER COMPETITION FROM NORTH ATLANTIC POINTS DOES NOT "AFFECT RATES" FROM MEMPHIS.

The rates on hay and grain to Charleston are :

			All-rail.	Water.
From Boston	to Charleston	.....	31c.	20c.
" New York	" "	.....	28c.	14c.
" Philadelphia	" "	.....	28c.	14c.
" Baltimore	" "	... ..	22c.	17c.
" Richmond	" "	.....	17c.	
" Norfolk	" "	.....	17c.	

The water rates are given at page 67, Trans.

The all-rail are not in evidence, but are taken from the tariff sheets of the Atlantic coast line and are correct.

Now we ask :

If the water competition between Boston and Charleston forces the all-rail rate from Memphis to Charleston down to 19c., why does not this water competition from Boston to Charleston force down the all-rail rate from Boston to Charleston to less than 31c.?

How can the all-rail rates from New York to Charleston be maintained at 28c. against a water rate of 14c. between the same points when this very competition forces the all-rail rate between Memphis and Charleston down to 19c.?

How do the roads from Philadelphia manage to keep up a rate of 28c. to Charleston against a 14c. water rate when this is the identical and awful water rate which reduces the price from Memphis to Charleston to 19c.?

How do the carriers from Baltimore maintain a 22c. rate to Charleston against a rail and water rate of 17c.?

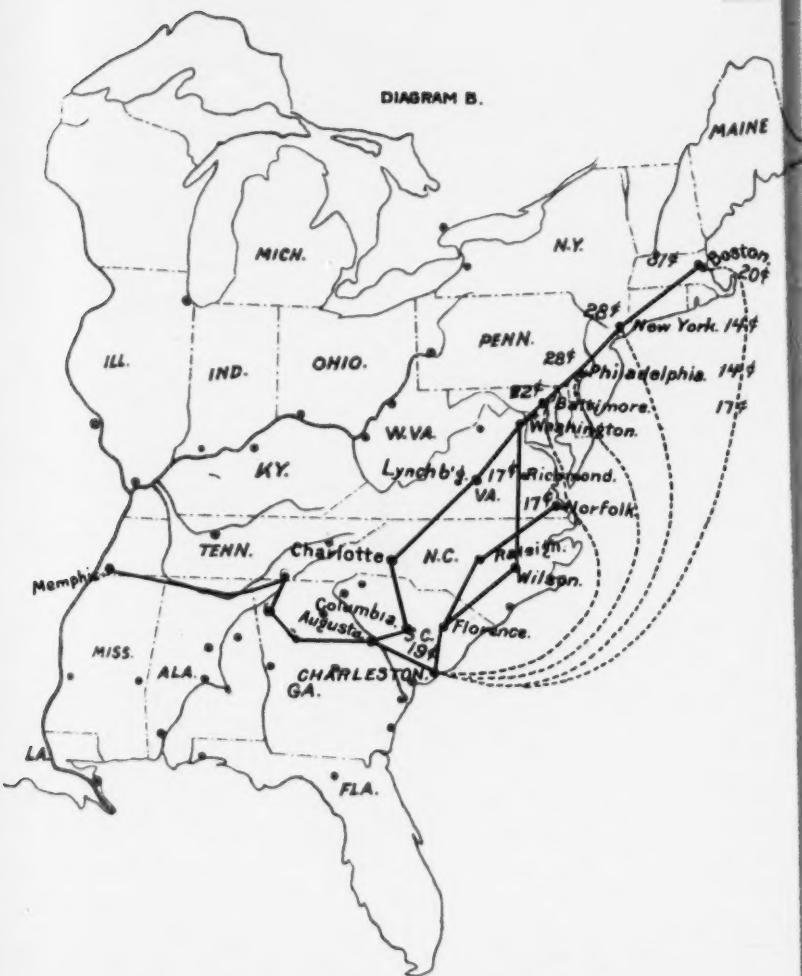
But, more marvelous still, how is all this managed in the teeth of an 8c. schooner rate from New York and a 4c. schooner rate from Baltimore?

Indeed, why is the Clyde Steamship Company, with its 14c. rate, not wiped off of the face of the water and the roads off of the face of the earth by this 4c. schooner rate?

The answer is very simple. This water competition does not "affect rates." It is not "effective competition." It is not "actual competition of controlling force in respect to traffic important in amount." It is not "competition that affects rates," even between the points of shipment and the points of destination. A few sporadic schooner shipments in the course of two or three years does not suffice. No effect on rates is produced.

It is a theory and not a condition that confronts us.

DIAGRAM B.





THE SIXTEEN-CENT RATE FROM CHICAGO TO CHARLESTON.

In the courts below great stress was laid on an alleged 16-cent. rate from Chicago to Charleston. A critical examination of this will now be made.

In his brief before the circuit court of appeals, counsel for the roads said :

"The lake and rail rate from Chicago to Baltimore is 12 cents per 100 pounds." "Trans., p. 102" (103 *here*).

"The schooner rate from Baltimore to Charleston is 4 cents per 100 pounds, thus making a total rate from Chicago to Charleston—lake, rail, and schooner—of 16 cents per 100 pounds." "Trans., p. 57" (p. 58 *here*).

Turning to page 103, Transcript in this court, we find a traffic sheet of the Erie and Western Transportation Company showing a rate of 12 cents to Baltimore.

As to this we have only to remark that for six months in the year ice stops navigation on the lakes; so this competition would only be "effective" for six months at most, and we are entitled to the benefit of the other six months when the lakes are closed. This benefit is accorded to all the rest of the country, why not to us?

Now, as to the 4-cent schooner rate. Turning to page 58, Transcript, we find :

Mr. BAXTER :

Q. "What rates are charged by schooners from Baltimore to Charleston on class D?"

Mr. JACKSON :

A. "Mr. Molony stated to me distinctly yesterday that he had brought in cargoes of grain from Norfolk and Baltimore by schooner at two cents per bushel—equal to about 4 cents per hundred pounds."

Will this court decide so grave an issue as this on mere hearsay evidence? And yet that is all the evidence my friend refers to. Is it not acknowledged the world over and laid down in all the books, from time immemorial, that the bas found hearsay evidence so unreliable that courts will law not act on it?

The wisdom of this rule can never be better illustrated than right here, for Mr. Jackson, a traffic manager, a man of high intelligence and accurate habits, falls into this dangerous pit. If even a person of superior intellect fails to

repeat correctly, the law is certainly most wise in laying down this rule against hearsay.

He says: "Mr. Molony stated to me distinctly yesterday that he had brought in cargoes of grain from Norfolk and Baltimore by schooner at 2 cents per bushel—equal to about 4 cents per 100 pounds."

Now, what does Mr. Molony say. At page 76 of the Transcript we find:

Mr. BAXTER:

Q. "What rate can you obtain on hay from Norfolk and Baltimore to Charleston?"

Mr. MOLONY:

A. "I can get a rate from New York. I do not get much hay from Baltimore. I can get a rate from New York of \$1.60 per ton, 8 cents per 100."

What a startling failure of proof. Not a word about any 4-cent rate at all from any point; not a syllable about any schooner rate whatever from Baltimore.

Mr. Jackson's recollection is full of flaws. He says Mr. Molony said Baltimore. Mr. Molony says he said New York. Jackson says Molony said grain. Molony says he said hay. Jackson says Molony said 4 cents. Molony says he said 8 cents. Mr. Jackson's testimony is obliterated.

And yet this is the entire basis of my friend's contention as to this 4-cent schooner rate from Baltimore.

We have here everything in the record on this point, and on the basis of Mr. Jackson's hearsay statement of what Mr. Molony said, repudiated by Mr. Molony himself, this court is asked to find that a schooner rate of 4 cents per hundred from Baltimore exists.

And upon such testimony as this, presented by those upon whom is the burden of proof, this court is asked to decide these momentous issues. This rate is advanced and pressed as the controlling factor in making rates from Memphis to Charleston, and all the testimony in the entire record is here set out.

Here is the very turning point, the keystone itself, of the justificatory defence of competition. To build upon the quicksands of hearsay is bad enough, but on those of repudiated hearsay is hopeless.

But all this serves at least one good purpose. It explains to our entire satisfaction the remarkable and contradictory but real truth set out by my friend at page 17 of his brief (*filed in C. C. A.*), namely: "From Baltimore to Charleston a rail and water rate of 17 cents per 100 pounds on hay can

e obtained *via* the Virginia ports, Norfolk," etc. (Trans., p. 6; 67 *here*).

Can any one believe for a moment that if "effective competition" by water at 4 cents per 100 pounds existed between Baltimore and Charleston a rail and water rate of 17 cents per 100 pounds could be maintained? Undoubtedly not. Would the merchants of Charleston be so ignorant as even not to know the price of hay and grain in Chicago (Trans., p. 71) if a 16-cent rate were available from that point? Clearly not.

Now let us analyze this hearsay testimony of Mr. Jackson a little further. He says Mr. Molony told him "2 cents per bushel; equal to about 4 cents per 100 pounds" (Trans., p. 58).

At page 76, Trans., we find:

"Mr. BAXTER:

"Q. Have you ever known what the charter rates would be? What it would cost to charter a vessel from New Orleans to Charleston, to bring any kind of freight, hay or anything else around that way?"

"Mr. MOLONY:

"A. I never figured it myself, but I have heard from other people who wanted to bring oats from Galveston and New Orleans that they could make a rate of from four to six cents bushel."

"Q. How much is that per hundred pounds?"

"A. About 18 or 20 cents."

So Mr. Jackson is not even correct in his hearsay multiplication, for if 4 cents a bushel produces a rate of 18 cents, 12 cents per bushel, instead of producing a rate of 4 cents per 100 pounds, would give a rate of 9 cents per 100 pounds according to Mr. Molony himself, Mr. Jackson's hearsay authority. It will be observed that on this point Mr. Molony goes into hearsay on his own account, and we thus have an example of one of the most extreme forms of hearsay. It is hearsay raised to the third power, and this court is asked to base its judgment on such testimony.

In spite of this 12-cent rail and water rate to Baltimore, the all-rail routes offering the advantage of additional facilities in swiftness, &c., are able to maintain and do maintain a rate of 17 cents per hundred from Chicago to Baltimore when the lakes are open, and 22 cents when the lakes are closed (Trans., p. 90).

In spite of the 4-cent schooner rate, the rail and water rate from Baltimore to Charleston is 17 cents (Trans., p. 67).

Then, in spite of the 16-cent rate, even if considered as proved, which we deny, the all-rail rate from Chicago *via* Baltimore to Charleston is 34 cents to 39 cents, according to the season.

That is, the water competition does not "affect rates."

Thus we have an absolute demonstration reduced to a mathematical certainty that no water competition actually exists that "affects rates," even between the point of shipment and the point of destination.

It is utterly useless, then, to contend that if this effect is not produced directly it can be produced indirectly.

If it cannot and does not have an effect on the points themselves it is impotent to affect other and different points, having an advantage of from 800 to 1,000 miles in distance from the water competition set up, over the points on the very margin of the waters themselves, which points even are not affected.

ALLEGED SIXTEEN-CENT RAIL AND WATER RATE FROM CHICAGO DOES NOT "AFFECT RATES" FROM MEMPHIS TO CHARLESTON.

The rates on hay and grain to Charleston are :

	All rail.	Rail and water.
From Chicago to Charleston.....	33c.	16c.
From Memphis to Charleston.....	19c.	

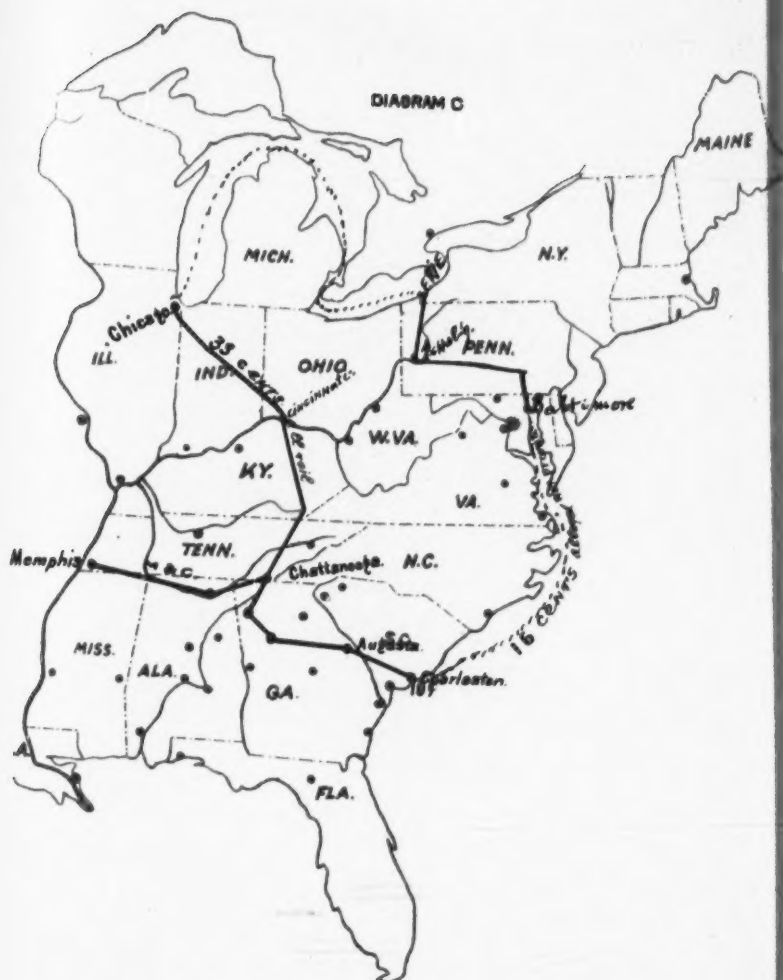
Assuming for the sake of argument only that a sixteen-cent rail and water rate *via* Baltimore from Chicago to Charleston has been proved, although we deny it and have clearly shown that it is not so, and assuming the correctness of the allegation in the answer (Trans., p. 38) that the all-rail rate *via* Ohio River points is 33c., though no proof of same has been offered, this gives us the lowest figures between Chicago and Charleston, all rail and rail and water respectively. We have just seen that the all-rail rate *via* Baltimore varies, according to the season, from 34c. to 39c.

Taking, then, these lowest figures, what do they show ?

Here we have the lowest rail and water rate anywhere suggested, and it ought to have its most powerful effect on the all-rail rates between the points directly affected—that is, Chicago and Charleston, the point of shipment and the point of destination. The roads between Chicago and Charleston must meet this rail and water rate, we are told, or be destroyed.

How comes it, then, that the all-rail rate between Chicago and Charleston is 33c. in spite of a rail and water rate be-

DIAGRAM C



tween the same points of only 16c.? Can it be possible that the all-rail lines between Chicago and Charleston are able to maintain their rates at 33c. in the face of a rail and water competition to which they are directly exposed, while the all-rail lines between Memphis and Charleston, hundreds of miles distant from the water line, have their rates forced down to 19c. by this very competition?

The circuit court of appeals and the commission refused to believe this, and held that the water competition set up was not "effective," that it was not of "controlling force," and that it did not "affect rates."

All the testimony sustains this view and it is unassailable.

WATERWAYS ARE COMPLEMENTS AND AIDS TO RAILWAYS AND NOT RUINOUS COMPETITORS.

Before concluding the discussion of water competition appellee begs leave to direct the attention of this court to the fact that the strongest and most prosperous roads in this country run along the margin of the Great Lakes and the Hudson river, and that waterways are not ruinous competitors of railways. The disastrous character of water competition has been greatly exaggerated by the railroads in the cases coming before the courts and the commission. It is important to understand the truth on this subject.

At pages 68, 69 of a most interesting and able monograph entitled "Inland Waterways, Their Relation to Transportation," by Emory R. Johnson, Ph. D., instructor in Political and Social Science, Harvard, published in the annals of the American Academy of Political and Social Sciences, the author says:

"The increase and extension of waterways aid the railroads through the increased travel which results from building up manufactures, developing trade, and promoting the growth of large cities. Take, for instance, the influence of that greatest of all inland waterways, the Great Lakes, on the growth of the passenger traffic in the States bordering the lakes. It has been, in large part, the improvement of the harbors and channels of the Great Lakes that has caused the phenomenal growth of Duluth, Milwaukee, Chicago, Detroit, Cleveland, Buffalo, etc. The railroads have not only aided the growth of these cities, but have in turn been greatly benefited through the development which has come to them by means of the improvements of the water route. Indeed the most important railroad systems of the United States are those which

"share in the commerce of the region round about the Great Lakes.

"This fact reveals the true nature of the two agents of commerce. They are complements of each other. When the waterway and railroad are perpendicular, they feed one another; when they run parallel, competition results in reciprocal development of each—at least, will so result when the waterway corresponds, as to dimensions and equipment, to the commercial needs of the present, and provides for the transportation of goods through comparatively long distances. The Rhine valley, as well as our own lake region, furnishes an illustration of this truth. The statistics of the traffic during the last forty years on the Rhine river and on the railroads of the Rhine valley, show that the growth of the transportation on each has been about equally rapid. Neither of the two means of communication has prevented the development of the other."

At page 64 the author says:

"The two means of transportation do not perform the same work, but services that are largely distinct and complementary to each other."

"Not all the freight transported by water would be moved by rail if the waterway did not exist. Canals, rivers and lakes create a large share of their traffic. The cost of transportation determines to a large extent the amount of goods shipped. Cheaper rates give to existing categories of freight a larger and wider market, and introduce into commerce new articles, such, for instance, as sandstone, straw, fertilizers and wood, which were formerly unable to bear the costs of transportation. Again, the waterway creates traffic for the railroads as well as for itself. It makes raw materials cheaper, increases the number of those that are available for use, and thus adds to the products of agriculture and manufacture seeking transportation."

He then goes on to say:

"The statistics of the traffic of the railways and waterways at Frankfort-on-the-Main, before and after the canalization of the Main from Mayence to Frankfort, show in a striking way that an increase in water traffic may be accompanied by an equal or greater rise in the traffic of competing railroads."

He then reviews the statistics for three years before the canalization and for three years after, and these show a gain to the railroads of over 400,000 tons per year.

At pages 69, 70 he says:

"The general relation of waterways and railroads, as collectors and distributors respectively, is shown by the ship-

"ment into and out of Paris by water and by rail in 1890. "The waterways brought to Paris 4,037,719 tons and the "railroads 5,826,548 tons, the percentage carried by each "being 41 per cent. and 59 per cent. respectively; but of "the freight from Paris which, of course, consisted mostly of "manufactured articles, the waterways carried only 953,834 "tons, while the railroads transported 2,335,252 tons, the "percentage being 29 per cent. and 71 per cent. respectively."

There are many other important and interesting facts on this topic, but sufficient has been said to show that waterways in many respects are highly beneficial to railroads, and that the idea advanced in this and other similar cases that they are disastrous competitors is fallacious. In truth, this court has so held already.

THIS COURT ITSELF HAS CONCLUSIVELY DECIDED THAT RAILROADS ARE NOT AFFECTED BY "SLOW AND OLD-FASHIONED METHODS OF TRANSPORTATION."

In the "Import Rate case," Mr. Justice Shiras, speaking for the court, says (162 U. S., 210):

"Before we consider the phraseology of the statute it may "be well to advert to the causes which induced its enactment. "They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use "railroads, they are so practically. *The demand for speedy "and prompt movement virtually forbids the employment of slow "and old-fashioned methods of transportation*, at least in the "case of the more valuable articles of traffic. At the same "time the immense outlay of money required to build and "maintain railroads and the necessity of resorting, in securing the rights of way, to the power of eminent domain in "effect disable individual merchants and shippers from "themselves providing such means of carriage. From the "very nature of the case, therefore, railroads are monopolies" * * *

So, in the very latest case decided by this court, it was fully recognized that railroads are to a large extent unaffected by waterway competition by virtue of the commercial requirements of the times and from their superiority over old-fashioned methods of transportation. At least such is the just inference taken in connection with the import case.

In the Alabama Midland case (168 U. S., 167) this court refused to hold that the mere fact of competition is sufficient and positively laid it down that the "character and extent "

of the competition must be considered. The contention of the roads was overruled in this particular.

In the case of *I. Com. Com. v. East Tennessee, V. & G. R'y Co.* (85 F. R., 112) Judge Severens says:

"Without much regard to the matter of rates, the carriage of freight by the navigation of such streams as the Cumberland has been almost entirely discontinued in recent years. The delays, the hazards and uncertainties which attend the navigation of such rivers have induced shippers to greatly prefer and to rely upon transportation by rail."

In the *Trans Missouri* case, Mr. Justice Peckham, commenting upon the great industrial transitions of the times, speaks of "a change from canal-boats and stage-coaches to railroads." * * * (166 U. S., 323.)

It is thus clearly established that some competition is not effective against railroads, and that slow and old-fashioned methods of transportation do not prevent railroads from having a monopoly in respect, at least, of the more valuable articles of commerce, the exigencies of modern conditions demanding "speedy and prompt movement." It is apparent, therefore, that waterways, being "slow and old-fashioned," are not in truth competitors of railroads.

This view is fully borne out by statistics. We quote again from the Monograph of Professor Johnson at pages 40, 41:

"* * * It may be said that the freight that is actually shipped on waterways will indicate clearly enough the kinds of goods best adapted to water transportation. In each case it will be seen that bulky raw materials constitute the largest share of the kinds of raw materials depending on the industrial character of the regions about the waterway. Of the tonnage on the Great Lakes in 1889, 27.96 per cent. was iron ore, 24.97 per cent. lumber, 22.24 per cent. coal, and 12.39 per cent. grain; these four articles thus comprising 87.56 per cent. of all the freight. The Ohio, the Rhine, and the Elbe may be taken as typical improved rivers. Out of a total of 5,528,857 tons shipped in 1889, on the Ohio river above Cincinnati, 65,550 tons were salt, 176,877 tons clay, sand and stone, 617,493 forest products, and 4,338,421 tons were coal. The freight forwarded from the ports of the Rhine is mostly coal, that being 72.26 per cent.; wood constitutes 3.83 per cent., iron ore 4.06 per cent.; salt about 1½ per cent.; hewed stone and brick nearly the same share. The traffic on the Elbe, upstream from Hamburg, consists of quite a different class of raw materials. In 1889, 31 per cent. was grain, 10 per cent. manure, 9 per cent. ores and metals, 5 per cent. petroleum, and coal and wood, each about 4 per cent. The character of canal freight is shown by shipments on the

"Erie canal, of which the products of the farm, the forest, and the mine constitute 76 per cent. The freight on the waterways at Berlin is mostly a barge traffic and affords a good example of inland navigation on ways practically artificial. Of the freight brought to Berlin in 1890, 49 per cent. consisted of stone and brick, 21 per cent. of lime, earth, sand, etc., 10 per cent. of wood, 7 per cent. of coal, and 6 per cent. of grain."

It is thus seen that when the "character and extent" of the traffic on waterways is considered, as it must be to properly gauge the competition, it consists almost wholly of heavy, cheap, bulky articles, and that manufactured valuable articles and the carriage of passengers naturally goes to the railroads at their own rates, unaffected by water competition.

At page 66 the author says:

"An important consideration and one that has not received due attention, is that much of the freight taken from the railroad for water transportation involves little or no real net loss to the railway companies. Railroads, especially the American, are doing an immense amount of business which brings them little or no direct profit. Operating expenses constitute a large share—sixty-seven per cent.—of earnings, and this is because a great deal of bulky freight is carried at a rate so low that the cost of operation often includes ninety per cent. of earnings. Indeed it is asserted that coal, coke, stone and iron ore are sometimes carried at a loss by the railroads in order that by so doing they may keep down the prices of crude products and thus sustain industry and enlarge the volume of higher grades of traffic. The operating expenses on the German railroads constitute fifty-five per cent. of gross earnings. Were the American railways to give over a good share of their bulky freight to the waterways it would not materially reduce their net profits. Grain is another article of transportation on which the railroads make only small profits. Grain rates are much lower in America than Germany, but local freight tariffs are much higher. American railroads are making the local freight pay for the trouble of handling grain at low profit.

"There are several advantages even which would flow to the railroads from the surrender of a large share of this bulky low-tariff freight. It would allow them to expand the volume of fast freight and increase passenger traffic, and this, too, by means of a proportionally less outlay of capital." He then goes on to elaborate this fact.

It is clear from all this that railways and waterways fulfill different functions, mutually beneficial and helpful to each

other, and that they are not competitors, except to a limited extent. They do not clash or collide, because they revolve in different orbits and occupy different spheres in the complicated relations of modern life. The telegraph lines cannot be said to compete with railroads for the same reason. The eye is not the competitor of the ear, nor does it suffer loss because it cannot hear.

This concludes the discussion of water competition. We will now take up the subject of competition of market with market.

ALLEGED COMPETITION OF MARKET WITH MARKET DOES NOT AFFECT RATES.

There is, as we have seen, nothing but hearsay as to the alleged competing markets of Norfolk and Baltimore, and hence no competent evidence upon which to act. This court has held that only competent evidence is to be considered.

"The questions whether certain charges were reasonable or otherwise; whether certain discriminations were due or undue, were questions of fact to be passed upon by the commission in the light of all the facts duly alleged and supported by *competent evidence*." * * * (Tex. & Pac. R'y Co. vs. I. Com. Com., 162 U. S., 197. Italics mine).

Not a single witness testifies that he has ever himself shipped, nor has he any personal knowledge of any shipment, from Baltimore or Norfolk. The most that we get from the testimony is that such shipments have been vaguely heard of. Four grain dealers out of five doing business in Charleston were examined, Kracke, Molony, Nathan, and Jones, and not one has said he ever shipped a bale of hay or a pound of grain from Norfolk or Baltimore; and as to New York, Boston, &c., it is proved by the road's own witness, Mr. Jackson, that the grain is first brought from the West to New York; that it is raised and grown and originates in the West (Trans., p. 63). There is not a syllable about a shipment from Paducah, Cairo, East Cairo, St. Louis, East St. Louis, &c.

The rates of transportation from these points to Charleston are given and nothing more. The prices of commodities in those markets are not mentioned, nor is there a word to show that they are large emporiums of trade in these articles; in fact, nothing at all of this sort is spoken of anywhere in the testimony. The record is absolutely silent as to whether or not these points enjoy an advantage in price over Memphis or other points.

It can hardly be possible that the railroads should expect any court to hold that the mere mention of the fact that the

freight rate from a certain point to another certain point is 23c. or 28c., as the case may be, proves that such a certain point is a market. We respectfully submit that no such inference can be drawn from such a solitary fact as a railroad tariff of 23c. or 28c.

We further submit that such evidence does not prove the additional element necessary for the railroad's contention, to wit, that it is a competing market.

As we have seen, the only thing stated in the evidence as to Cairo, Paducah, East St. Louis, &c., is the rate of 23c. and 28c. respectively (Trans., p. 59). There are many other places in this country which have a rate of 23c. and 28c. This is hardly enough to prove that such places are markets competing with Memphis for the trade of Charleston.

The mere production of a tariff sheet showing rates is an easy matter. There are numberless places that have rates. They also have birds and trees and things of that sort equally relevant and pertinent to prove that they are competing markets. The roads went a little further in the case of Chicago and proved by Mr. Molony that he made one shipment of grain from Chicago sixteen months prior to the hearing before the commission (Trans., pp. 75, 76).

But one swallow does not make a summer, and this solitary shipment is not sufficient to prove competition between market and market, such as affects rates.

The testimony as to prices in the various grain markets is very meager, but it so happens that the only testimony in the record proves that Memphis has a great advantage over other markets in price, and that hay is cheaper in Memphis by from \$2 to \$5 per ton; an average of \$3.50 (Trans., p. 78). It is also in evidence that the dealers would buy in the cheapest market, even though freight rates were a little higher (Trans., p. 78).

So it is clearly established by the proofs that as far as market competition is concerned Memphis could stand a higher freight rate than the other places by reason of the cheapness of the price of the commodities in question, and that instead of market competition forcing her freight rates down the very reverse is true.

It is thus demonstrated that the finding of fact by the circuit court of appeals, concurring with the commission, that competition between market and market does not affect rates is sustained by the evidence, and is therefore unassailable.

By the preceding review and analysis of the testimony the finding of the court of appeals, concurring with the commission, that in this case, as a matter of fact, the transportation was done under substantially similar circum-

stances and conditions, is established as correct in every particular.

It has been clearly proved that the alleged competition by rail did not affect rates; that the water competition set up between Chicago and the North Atlantic ports was not such as to affect rates, and that the alleged competition between market and market did not affect rates.

As each case turns upon its own circumstances (168 U. S., 170), these findings of fact conclude the present controversy. Nevertheless we will take up the matters of law laid down by the court and the commission.

THE CONSTRUCTION OF THE FOURTH SECTION BY THE CIRCUIT COURT OF APPEALS.

At pages 131, 132, Trans., we find the Circuit Court of Appeals announcing the law as follows. See also 42 U. S. Appeals, 581:

" We adopt the conclusion heretofore announced by the
 " Interstate Commerce Commission, which is, in substance,
 " that in order to justify the greater charge for the shorter
 " distance because of water competition, the transportation
 " as to which such competition exists must be concerning
 " freight to the longer distance point, which, if not carried
 " to such point by the road giving the rate complained of,
 " could reach that point by water transportation; and also
 " that the competition of one transportation line cannot be
 " said to meet that of another for the carriage of traffic from
 " any particular locality, unless one line could perform the
 " service if the other did not. Such we believe to be the
 " true meaning of said fourth section, so far as the point we
 " are now considering is involved. We are also of opinion
 " that the competition claimed by the appellees to exist
 " between the different markets—particularly those of Mem-
 " phis, Chicago, and the North Atlantic ports—to supply
 " the trade of Charleston in the products mentioned, is not
 " in reality the competition that affects rates from a particu-
 " lar locality, but is one that is regulated by the commercial
 " circumstances existing at those points, applicable to busi-
 " ness of that character and not connected with the usual
 " conditions under which transportation is conducted, nor
 " does such competition in our judgment create the dissimi-
 " lar circumstances and conditions referred to in the fourth
 " section of the act now under consideration. And we fur-
 " ther hold that competition between carriers subject to the
 " requirements of said act does not produce such substantial

"dissimilarity in the circumstances and conditions under which the transportation is performed, as will justify such carriers in making a greater charge for the shorter than for the longer haul, without an order to that effect from the commission, granted by it as provided for in the proviso to the fourth section.

"It is fair to presume that if the facts in any given case justify departure from this rule, the commission will, on a proper showing, grant the relief asked for, and make such exceptions as the circumstances suggest as proper, and justice to the carrier, as well as the shipper, demands. If the carriers were permitted to determine such questions, the conflicting results produced by opposing interests would not only cause confusion, but work great injury in many cases to the shippers, to localities, and also to certain lines of business that would be affected thereby. If the competition of markets, or of carrying lines, subject to the provisions of the commerce act, justify carriers in making greater short-haul and lower long-haul charges, over the same line, without an order from the commission, issued after due investigation, then the unjust rates for transportation existing when that law was enacted, and which it was intended should be prohibited by it, will continue to be imposed and collected, and schedules shall be made, announced and maintained, to the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others. This statute was intended to prevent any and all kinds of discrimination in favor of localities, individuals or corporations, and to put all shippers on the same footing—that of perfect equality."

The first observation to be made on this branch of the case is that none of the assignments of error raise any of these questions specifically as required by the rules and decisions of this court, and consequently they are not open to review except at the option of this court.

Rule 35, Supreme Court.

An item of the decree below, which was not appealed from, is not before this court for consideration.

Harrison vs. Perea, 168 U. S., 311.

The rules, regulations, and restrictions are the same as to appeals as in cases of writs of error.

Farrar vs. Churchill, 135 U. S., 609.

When exception is too general this court will not review.

Halloway vs. Dunham, 170 U. S., 618.

An assignment of error which omits to show in what the error consisted or to specify in what part of the charge it occurred is insufficient.

Lucas vs. Brooks, 18 Wall., 456.

"Questions of importance were discussed at the bar, some of which it cannot be admitted were properly presented. Such questions only as are specified in the assignments of errors, are, in general, to be regarded as open to the plaintiff and it is very doubtful whether an assignment that the decision of the circuit court is for the wrong party is sufficient to present any question for decision". * * *

Scholey vs. Rew, 23 Wall., 345.

Under these rulings and many others it is clear that an assignment of error must be definite, distinct, and specific.

The only error assigned in the case at bar relating to the fourth section of the act is as to "substantially similar circumstances and conditions." This is purely and solely a question of fact to be determined upon the circumstances in each case as we have seen, and an assignment directed to this subject solely raises no question of law.

Nevertheless, as a matter of prudence, we will discuss the questions of law.

COMPETITION MUST BE DIRECT AND IMMEDIATE. THE PROXIMATE CAUSE NOT COLLATERAL.

Taking these rulings up in their order, we address ourselves to the consideration of the first proposition, namely, that water competition must exist between the point of shipment and the point of destination as to freight that would go by the water line if the rail line did not reduce, and that it must be the same with rail lines competing with each other.

This is nothing more than an application of the familiar maxim *Causa proxima non remota spectatur*.

When this court laid it down in the Import Rate case and the Alabama Midland case that competition which affects rates is to be considered, it did not mean to overrule or nullify this maxim and allow the most remote circumstances having an indirect, incidental, and collateral effect on rates to be considered. The competition must be proximate, direct, immediate; it must be the dominant cause, the efficient cause, the *causa causans*, the proximate cause, to use the language of this court, where this doctrine has been discussed.

It was in full recognition of this universal rule that this court used the phrase "competition that affects rates should be considered." In truth, this question was clearly decided in the Import case, for the entire controversy in that case was as to freight which would have gone from its point of origin or shipment to its point of destination by a competing water route or by a competing rail and water route unless rates were reduced by the appellant, The Texas and Pacific Railway Company.

At page 205, 162 U. S., Mr. Justice Shiras says :

"The answer of the Texas and Pacific Railway Company to the petition of the New York board of trade and transportation before the Interstate Commerce Commission, and the answer of said company to the petition of the commission filed in the circuit court, allege that rates for the transportation of commodities from Liverpool and London, England, to San Francisco, California, are in effect fixed and controlled by the competition of sailing vessels for the entire distance; by steamships and sailing vessels in connection with railroads across the isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting there under through arrangements with the Southern Pacific Company to San Francisco; that, unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company". * * *

At page 216, 162 U. S. :

"It alleged that in order to get this traffic it was necessary to give through rates from the *places of shipment to the places of final destination*, and that in fixing said rates it was controlled by an ocean competition by sailing and steam vessels by way of the Isthmus and around the Horn, and also to some extent by a competition through the Canada route to the Pacific coast." (Italics mine.)

At page 217, 162 U. S. :

"The defendant further alleged that unless it used said means to get *such traffic the merchandize to the Pacific coast would none of it reach New Orleans, but would go by the other means of transportation*". * * * (Italics mine.)

Mr. Justice Shiras then goes on to review elaborately the cases, and as a conclusion from all the cases announces :

"That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits

"of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust", &c. (162 U. S., 233, 234. Italics mine).

It is clear, then, that in this case the freight in question was such as would go by "other competitive routes" "from the places of shipment to the places of final destination."

In other words, the competition was direct, immediate, proximate, and its effect on rates was direct, immediate, and proximate, and that was the competition this court said should be considered.

In the case at bar no competition was set up, either by rail or water, showing that freight originating at Memphis would be taken to Charleston by "other competitive routes" "unless appellants lowered their rates." It was not established that this freight would be taken "from the places of shipment to the places of final destination" by other lines unless rates were reduced to meet competition as to this freight.

And so in the Alabama Midland or "Troy case." At page 172, 168 U. S., this court quotes the language of the circuit court of appeals as follows: "And this water line affects to a degree less or more all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from *Montgomery* to the South Atlantic ports for export, but it would take the cotton to the points of its ultimate destination if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from Montgomery through the port of Mobile." (Italics mine.)

Again, it is clear that the competition set up and considered in the Troy case was as to freight that would go by "other competitive routes" "from the places of shipment to the places of final destination."

In the case at bar no water competition from Memphis to Charleston was set up in the pleadings, although counsel said he would amend his pleadings if this could be shown or abandon the point (Trans., p. 56).

No such amendment was ever made, and the attempt to prove such competition was a dismal failure, and the point was abandoned.

Therefore no water competition between the points of shipment and the points of destination is made out in this case, nor is there any competition by rail from the point of shipment to the point of destination, all the roads having agreed not to compete. In other words, this is the Social Circle case over again, and not the Troy case.

The necessity for the influence, being direct, immediate, and proximate, is well illustrated and conclusively settled by this court in the case of *Hopkins vs. U. S.*, 171 U. S., 578, decided at this term. In that case this court said in construing the anti-trust law :

"There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely although certainly *Ficklen vs. Shelby County Taxing District*, 145 U. S. 1"; (171 U. S., 592).

At pages 593, 594, 171 U. S., Mr. Justice Peckham goes on to say :

"Suppose the railroad company which transports the cattle, itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the land-owners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that an agreement of the land-owners among themselves would be a violation of the act as being in restraint of trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the States? * * * Would an agreement among themselves by locomotive engineers, firemen or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

"In our opinion all these queries should be answered in the negative. The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. * * * An agreement may in a variety of ways affect interstate commerce, just as State legislation may, and yet, like it be entirely valid, because the interference produced by the agreement or by the legislation is not direct (*Sherlock vs. Alling*, 93 U. S., 99-103; *United States vs. E. C. Knight Company*, 156 U. S., 1, 16; *Pittsburgh & Southern Coal Co. vs. Louisiana*, 156 U. S., 590, 597; *Transportation Company vs. Parkersburg*, 107 U. S., 691; *Ficklen vs. Shelby County*, *supra*.)"

It is clear, then, that direct effects and proximate causes

only will be considered in construing the laws, the fourth section of the act to regulate commerce as well as the anti-trust law, and that there has been no abrogation of the maxim *Causa proxima non remota spectatur*.

It would, indeed, be a novel doctrine if the contrary were true, and that competition in the most distant parts of the world is to be considered in reference to freight from the remotest regions of the earth.

If this be so, however, is there a limit to it, and who is to judge when this limit is reached?

Buenos Ayres, at the mouth of the Rio de la Plata, in the Argentine Republic, is a port which ships large quantities of grain. It is over 6,000 miles from Charleston, but why not say that these roads in the case at bar are entitled to charge double the rate now in force to Summerville because Mr. Molony can get a schooner rate of 2 cents a bushel on Buenos Ayres wheat. He need not testify that he does it, for in his Chicago shipment he refuses to go that far; he only says he can do it.

This being allowed, why not permit the present rate to Summerville to be trebled in order to make up for the loss sustained by the roads because Mr. Molony has discovered that he can get a 1-cent rate on California wheat brought around the Horn to Charleston?

And after that, if he discovers that he can get a still less rate from Australia, may not that be a good reason for quadrupling the present Summerville rate?

Then, when this is done, we still have the case of India to provide for, in the event that he can get rates from that point, and still there remains Russia, "in the lowest deep, a lower deep."

We respectfully submit, therefore, that the ruling of the circuit court of appeals on this point is correct. This brings us to market competition.

COMPETITION OF MARKET WITH MARKET.

In the Social Circle case the roads claimed that they had the right to practically adjust the differences in price between buggies made in Baltimore and those made in Cincinnati by arranging the freight rates to Augusta, the common market, so as to put the Baltimore manufacturer and the Cincinnati manufacturer on an equal footing. The Interstate Commerce Commission held that it was not the province of the roads "to adjust trade relations and equalize commercial conditions" (*James & Mayer Buggy Co. vs. Cinn., N. O. & T. R. R.*, 4 I. C. C. Rep., 744). This court affirmed the conclusions of the commission.

Suppose by means of some invention the Baltimore maker were able to produce a carriage at one-third the cost that the Cincinnati man could do it, would the roads have the right to neutralize this advantage in the Augusta market or any other market by increasing freight rates from Baltimore or lowering them to Cincinnati? Upon what principle could they assume such a right? Yet that is the contention here. The inherent vice of the position is strikingly exhibited in connection with the facts of the case at bar. Memphis has an advantage of \$3.50 per ton in price on hay over New York and other eastern markets (Trans., p. 78). Can the roads nullify this by imposing high rates from Memphis or giving low rates from New York? If so, they could drive the farmer out of business at any point.

For when we begin to consider that if the roads are allowed to carry wheat to Charleston, say, in order to build up the western farmer by putting his product in that market so as to meet the wheat of the Maine farmer on equal or better terms, they may not stop at Charleston; but, having driven the Maine man out of Charleston, the roads may carry the western product to New York and drive the Maine man out of that market. After that they can pursue him to Boston, and finally to Maine itself, and drive him out of business even there.

This, of course, will build up the business of the West and foster western enterprises. But the Supreme Court has said:

"It is no proper business of a common carrier to foster particular enterprises or to build up new industries."

U. P. R. R. *vs.* Goodridge, 149 U. S., 690.

Unquestionably, then, if there is any force at all in the position of competition of market with market and product with product, it is pre-eminently a matter for the regulating authority to prescribe the limits to which a public carrier may go, and it is not a subject to be left in the hands of the roads.

We think the Supreme Court has decided this, not only in the Social Circle case, but also in the Goodridge case, 149 U. S., 690. This court says:

"This act (a Colorado statute) was intended to apply to 'infra-state traffic, the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the States, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, saving only a power, not in the railroad company itself, but in the commissioner, to except 'special cases designed

"to promote the development of the resources of this State,"
 "and not to prevent the commissioner 'from making a
 "lower rate per ton per mile in car-load lots than shall
 "govern shipments in less quantities than car-load lots,
 "and from making lower rates for lots of less than five car-
 "loads than for single car-load lots.' The statute recognizes
 "the fact that it is no proper business of a common carrier
 "to foster particular enterprises or to build up new indus-
 "tries; but, deriving its franchise from the legislature and
 "depending upon the will of the people for its very exist-
 "ence, it is bound to deal fairly with the public, to extend
 "them reasonable facilities for the transportation of their
 "persons and property, and to put all its patrons upon an
 "absolute equality."

It is clear, then, that the prices and quality of articles must be given their full play, and it is not any proper business of a common carrier to interfere with their operation; nor should they interfere with the ingenuity or energy of individuals whose skill and inventive genius or business ability gives them advantages.

It is not their province to "equalize trade relations and adjust commercial conditions."

Such is the decision of this court in the Goodridge case and the Social Circle case, and the Circuit Court of Appeals was correct in following these rulings.

Moreover, competition of market with market is too remote a cause to be taken into account under the cases heretofore cited.

We now come to the question of carriers subject to the act.

This ruling does not in any way affect or concern the totally different and distinct principle as to what the traffic will bear, which is a question that operates universally on all lines and must be and is determined with reference to the articles offered for transportation on those lines.

Counsel for the roads seeks to confuse the two ideas; hence we quote Judge Cooley on the point.

At page 66, *In re L. & N. R. R. Co.*, 1 I. C. C. R., he says:

"This is a just and sound principle when justly applied."

* * *

"But the cases must be very rare in which the larger
 "charge in the aggregate for the shorter haul of the same
 "kind of property over the same line in the same direction
 "could be justified, when no other reason supported it than
 "the fact that the traffic for the longer haul would bear no
 "more. Manifestly such a discrimination when not im-
 "perative on other grounds is unjust; and the injustice be-
 "comes oppression when the effect is to increase the burden

"upon the traffic which has the shorter haul. There is a plain limit to the application of the principle that property is to be carried at rates it will bear, and the limit is reached when the rates charged are so low that further reduction would necessitate an increase of the charges upon other traffic in order to make up to the carrier such loss as the reduction causes. If some common vegetable, worth but five cents a hundred pounds more at a market a thousand miles distant than it is where it is grown, were to be transported that distance for the sum named, the producer nearer the market, if subjected to a high charge, would have a right to complain that not only did the discrimination reduce the market value of his produce, but that the acceptance of the unreasonably low rates from the distant producer had a tendency to increase the charge for the shorter haul, so as to make it not only relatively, but, when considered by itself, unreasonably high."

COMPETITION BETWEEN CARRIER AND CARRIER SUBJECT TO THE ACT.

It must be confessed that the ruling of the circuit court of appeals in the case at bar and the ruling of this court in the "Troy case" on this point of carrier and carrier subject to the act seem at first sight not to be in accord.

Counsel for appellee therefore without hesitation states that he is not presumptuous enough to suggest that this court should rehear the matter, and this notwithstanding the fact that this court seems to invite something of the sort by the following statement in its opinion: "The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue," 168 U. S., 168, and further on proceeds to show that the appeal court below was reversed in the Import case because its decision went off on an "issue that was not actually before the court," thus, perhaps, intimating that its ruling on this question of carrier and carrier subject to the act might be regarded as an *obiter dictum*.

However this may be, counsel for appellee feels that it would come with little grace from one so insignificant as himself to suggest to the most august tribunal in the world that it had misinterpreted or misapplied some decision or overlooked some important principle having a bearing on the subject, the usual course, as Mr. Justice Peckham says in the Joint Traffic case, where a rehearing is sought, and he frankly admits that he has not the courage to make such a suggestion.

Nevertheless, he feels that it can hardly be possible that so able a jurist as Judge Goff, after giving this case the consideration it received, holding it up for eighteen months before decision and refusing a rehearing after he had seen the opinion of this court in the Troy case, could have entertained views diametrically opposed to those of this court, and it may be that if the opinion of Judge Goff is properly understood and the opinion of Mr. Justice Shiras is properly understood, all conflict on this point will be seen to be more apparent than real, and that the fault lies in the miscomprehension of those who read these two opinions.

It may be proper, then, to show how Judge Goff's opinion came about, merely by way of explanation, and not by way of re-argument, for if it should develop that precisely the same question was not passed upon in both courts, the apparent conflict would vanish. And this is the very thing that has happened.

Mr. Justice Shiras says :

"The claim now made for the commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on account of competition, or any other similar element which would make its application unfair, is the commission itself, which is bound to consider the question upon application by the railroad company, but whose decision is discretionary and unreviewable" (168 U.S., 168; Trans., pp. 147, 148).

No such question was discussed before the Circuit Court of Appeals, and no such claim was made. On the contrary, it was strenuously argued against the contention of the railroads that it was the duty of the court to decide the matter for itself on all the facts as a court of equity; and the Appeal Court did this, and so far is in full accord with this court in the Troy case.

It was also pressed upon the Court of Appeals that "competition that affects rates" could be considered and ought to be considered, and the court was asked to consider all the competition set up by the roads of every kind and description whatever, and it did consider same and pass upon it.

It was also urged upon the Court of Appeals by appellee here, who was appellant below, that the mere fact of competition was not sufficient without regard to its kind or force to exempt the carrier from compliance with the fourth section, and the court so held, being thus in accord with this court.

It was also argued before the Appeal Court that, in view of the fact that the character and extent of competition must

be considered, there would necessarily arise three classes of cases, and circumstances of three classes :

1. Obviously similar circumstances.
2. Obviously dissimilar circumstances.
3. Doubtful circumstances.

In the case of class 1 the fourth section applied and the roads could only be relieved under the proviso by applying to the commission.

In the case of class 2, *ipso facto*, they were relieved without permission of anybody.

In the case of class 3 they might or might not require an exoneratur from the commission.

It was pointed out that this was the construction placed upon the act by Judge Pardee.

In *Missouri Pac. R. Co. vs. Texas and P. R. Co.*, 31 F. R., 862, Judge Pardee says :

"Under section 4 of the interstate commerce law, relating to the charges for the long and short haul, it seems that where the circumstances and conditions are dissimilar there is no prohibition; where the circumstances and conditions are similar, the prohibition attaches; and that where it is difficult to point out clearly the circumstances or conditions which produce dissimilarity, the doubt should go in favor of the object of the law, and the circumstances and conditions should be taken as substantially similar. Where the circumstances and conditions are similar, or substantially similar, and the result to the carrier is injurious, relief can be had only through the commission."

That this was also the construction put upon the statute by Judge Cooley in *re Louisville and Nashville R. R. Co.* (1 I. C. C. Rep., 77) and by the commission in *Geo. Comm. vs. Clyde Co. et al.* (5 I. C. C. Rep., pp. 328-414, inclusive).

That Judge Cooley's opinion must be read as a whole and its meaning must not be gathered from separate extracts and sentences taken apart from their context, and thus read it would be found that this construction had been placed upon the statute from the very first, and all the opinions of the commission were in harmony.

That the meaning of the law and the true meaning of the commission's decisions from first to last was, as pointed out by Judge Pardee, that there might be cases where the circumstances were clearly similar, that there might be cases where they were clearly dissimilar, and that there might be cases where they were *prima facie* similar, because doubtful, the doubt being solved in favor of the law.

Where the circumstances are similar or *prima facie* similar application must be made to the commission under the proviso.

It was never for a moment urged upon Judge Goff that under substantially dissimilar circumstances the commission must be applied to. Hence he did not pass upon the same question set forth by Mr. Justice Shiras, who says:

"The proposition comes to this, that when the circumstances and conditions are substantially dissimilar, the railway companies can only avail themselves of such a situation by an application to the commission" (168 U. S., 144).

The question before Judge Goff does not seem to have been made before this court in the Alabama Midland case. Hence there is no conflict.

This court does not discuss in its opinion doubtful cases at all. It does not expressly hold that there are no doubtful cases, nor does it decide that if circumstances are not similar they must necessarily be dissimilar. That there can be only two classes of circumstances is not distinctly laid down. Room is left to harmonize all those decisions such as Judge Pardee's, which recognize three classes of circumstances. And Judge Goff's opinion is one of these. It may be that this court will itself say that it is possible for cases to arise where it is difficult and doubtful to determine whether the circumstances are similar or dissimilar.

The question of recognizing such a category has not yet been before this court. It now arises.

If this court should decide that there is such a class, and we venture to believe that it will, then the further question arises, What cases are to be put in that class?

The first question never having been before this court, this incidental question obviously has not been before it, and is *res integra* here.

It is true and not disputed that competition of railroads subject to the act may in some cases create substantially dissimilar circumstances and conditions, and if this appears on investigation by the commission upon application under the proviso or when the roads are brought before the courts not having made application, they are relieved *ipso facto* from the restraints of the fourth section. This proposition was not controverted before Judge Goff. This, we submit, is the full extent of the decision on this point of this court in the Alabama Midland case, this court expressly going out of its way "to guard against any misapprehension" of its decision by confining its operation to "some cases," not "all cases," thus clearly indicating that the case then before it was the exception and not the rule.

This court has not decided nor does it seem to have directed its attention to the totally different question, namely, as a general rule, does competition between roads

subject to the act create and constitute *prima facie* similar or dissimilar circumstances? Are the circumstances of such competition obviously and clearly dissimilar or is that a matter of doubt and difficulty to be solved in favor of the object of the law? Does such competition on its face create a solid, substantial difference of conditions?

This was the question presented to the circuit court of appeals.

With the utmost deference we submit that it is not the same question that was presented here. As the Latins say, it is *similis ergo non eadem*.

At any rate, believing that it was not the same question, for we would not reargue it if we thought so, we earnestly urge that competition between roads subject to the act does not *prima facie* constitute dissimilar circumstances as a general rule.

When competition exists between roads subject to the act the presumption is that the law is obeyed by both roads; that they meet on equal terms, and that *prima facie* the circumstances and conditions are substantially similar.

Suppose two roads run from Chicago to New York, both compete for traffic between those points, but before they can do so they must comply with the law. On through business neither can charge more to intermediate stations than the aggregate between Chicago and New York. So the result is that neither road can collect out of intermediate traffic the sinews of war to enable it to reduce the rates on competitive traffic below zero.

As a matter of fact, the roads between Chicago and New York have placed this construction on the act from the first, and their rates do not violate the fourth section (Trans., pp. 88, 89.)

It is familiar history that in strife for traffic the roads have frequently carried far below cost and made up the loss on intermediate freight, and this was one of the evils against which the commerce act was directed.

The roads subject to the act are, in the eye of the law, all on equal terms, governed by the same rules, and bound to conduct their business under the same regulations; so the presumption is that the circumstances and conditions are substantially similar. There is no obvious dissimilarity. But should a case arise where one road has the shortest and most direct line to New York, say, and its competitor has a long, circuitous route, the short line makes the price and the long line must meet it. If this can be done by the long line without violating the fourth section, well and good, but should it turn out that the disadvantage of the long line is so great that it cannot meet the competitive prices of the

short line without making some or all of its intermediate rates greater than its through rates, then the question would arise whether this could be done with justice to the intermediate points. For if the competitive business were carried at a loss, and the object of raising the intermediate rates were to make up for that loss, then this would be an injustice which the law could not permit. It is not such competition "as having due regard to the interests of the public" and of the carrier, ought justly to have effect upon the rates," to use the language of Mr. Justice Shiras in the *Troy* case.

There might arise a hundred other questions, but this illustration shows that, as between carrier and carrier subject to the act, the mere fact of competition does not make out plainly dissimilar circumstances.

Take the case at bar. Competition between the Port Royal and Augusta via the Charleston and Savannah road to Charleston is set up by the South Carolina road as a clearly dissimilar circumstance.

Both lines run from Augusta to Charleston, and one is only 10 miles longer than the other. Both pass through South Carolina—that is, the same State. Every condition of climate, population, and volume of business is the same; the character of the country is the same; in fact, there is no difference except that one is 10 miles longer than the other. Why should one disobey the fourth section, then, and not the other, or why should both disobey the statute? If both were required to obey the law, where would there be any hardship? Could they not compete for the business of Charleston in a lawful manner as well as in an unlawful one? If both were compelled to put such intermediate rates in force as were not greater than the through rate, where would one have any advantage over the other? Would they not both be on precisely equal terms and neither at a disadvantage?

Of course, if it should appear that one road had to keep up expensive trestles through swamps, or for some other good reason could not comply with the law without sustaining injury, then the commission could give relief. But to say that the mere fact of two roads running between Augusta and Charleston is so clearly a dissimilar circumstance that without application to the commission both are at liberty to violate the law is something we cannot concede.

We prefer to believe that Congress knew that sometimes two and sometimes more than two lines ran from one city to the other in this country. And that fact alone could not exempt the two or more lines from the operation of the law on the ground that it was a strange and dissimilar circumstance. On the contrary it strikes us that this condition of

affairs is common, prevalent, and most monotonously similar all over the country.

"Congress must have intended something unusual and peculiar, out of the ordinary course of business, as that which would create a substantial dissimilarity; otherwise the vast bulk of transportation would not be subject to the rule at all" (*I. C. C. vs. E. T., V. & G. R'y*, 85 F. R., 107).

It seems to us, therefore, that in the case of carriers subject to the act the circumstances and conditions are on their face, instead of being dissimilar, so much alike that relief must be sought under the proviso.

It would be a curious result, indeed, if the law should operate where there was one road between two points, but that the moment a second line was built between those points the law is abrogated *ipso facto*, and we respectfully submit that this is not the decision of this court in the Alabama Midland case. That decision, like all others, must be read in the light of the facts of that case. Those facts established effective competition beyond doubt, and the language of the court, when thus read in its application to the facts of the case, precludes the possibility of putting any such meaning upon the opinion.

Indeed, it would be imputing a strange doctrine to this court to so interpret its decision, for it is well known that a number of railroads centering at a place does not necessarily imply competition between them. In fact, there is a case now pending where the shorter distance point has more railroads than the longer distance point, and yet they do not compete. At page 116, 85 F. R., the court says:

"Chattanooga, too, has more railroads. They might compete if they would. They do not think it to their interest to do so."

This court has not nullified the fourth section nor has it excluded the proviso from any field of operation. This clearly appears when the Alabama Midland decision is considered in connection with previous decisions of this court. It has not overruled the canons of interpretation laid down by Chief Justice Marshall, who said:

"It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent, for it would be absurd, as well as useless, to except from a granted power that which was not granted—that which the words of the grant could not comprehend" (*Gibbons vs. Ogden*, 9 Wheat., 191).

So we say here it would be absurd and useless to clothe the commission with power to exempt from the general rule if the general rule did not apply. The extent of the general rule is marked by the exception, and, unless it be

obvious and clear that the general rule has no application, the commission must be applied to, and it can grant an exemption only after an investigation and after it has found that the case is special. Wherever there is doubt, then, as to whether the transportation is of the "like kind of property" or "over the same line" or "under substantially similar circumstances and conditions," there must be a consideration of the facts of the particular case by the commission.

This reasoning is fully sustained by language of the Supreme Court in the Import Rate case :

"The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that in deciding whether differences in charges in given cases were or were not unjust there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions.' To answer such questions in any case coming before the commission *requires an investigation into the facts*" * * * (162 U. S., 219). (Italics mine.)

If an investigation is *implied* in the second section, what are we to think when we find it expressly provided for in the fourth section?

Are we to take the view of the roads that it is not necessary and no application to the commission is ever to be made?

This construction of the proviso was made by the commission in the Social Circle case, "whose conclusions have been accepted and approved by the circuit court of appeals, and we find nothing in the record to make it our duty to draw a different conclusion" (162 U. S., 194), to use the words of Mr. Justice Shiras.

None of these cases were overruled or modified in the Alabama Midland decision. On the contrary, they were all reaffirmed and relied on by this court, and there is no want of harmony between the Alabama Midland case and any of these decisions; nor is there any conflict, as we have pointed out, between Judge Goff's opinion, following the previous rulings of this court, and the Troy case. The question of *prima facie* similarity or *prima facie* dissimilarity was not touched upon by this court, and that was the issue before Judge Goff.

Indeed, as this court has adopted and approved Judge Cooley's construction of the fourth section in the case of *In re L. & N. Petition*, 1 I. C. C. R., 53, and as the Circuit Court of Appeals in the case at bar has done the same thing, it

would be quite remarkable if any real conflict of views resulted between the two courts.

An examination of Judge Cooley's rulings will clearly show that this has not occurred, and that the apparent dissonance arises from the fact that Judge Goff adopted the general rule laid down by Judge Cooley, the case at bar being one to which said general rule is applicable, and that, on the other hand, this court in the Alabama Midland decision adopted the rule laid down by Judge Cooley for "clearly exceptional cases," the Alabama Midland case being one of that sort.

Judge Cooley, *In re L. & N. R. R.*, 1 I. C. C. R., 53, states that Congress laid down a general rule in the fourth section forbidding a greater charge for the long haul than for the short haul, and then proceeded to authorize exceptions conferring certain powers with reference thereto on the commission. This eminent jurist then goes on to say :

"From the first there have been two opinions regarding the proper construction of this provision for exceptions; one view that no exception can be lawful unless made with the sanction of the commission; and the other, apparently better supported on the words of the statute, that an order of relief is not required when the circumstances and conditions are substantially dissimilar, since the carrier, in acting upon them would commit no breach of law, though it would be responsible in case it were found that the circumstances and conditions were misconceived or misjudged. Under this last view the order for relief would be needful only when the case was not one of *plainly dissimilar circumstances and conditions*, but in which nevertheless, there might be reasons and equities that would sanction such greater charge." (Italics mine.)

At page 57 he says:

"We have listened, with an earnest desire to reach a just conclusion, to all the arguments presented on the construction of the statute, by those appearing either to advocate or to oppose the applications, and after mature consideration we are satisfied that the statute does not require that the commission shall prescribe in every instance the exceptional case, and grant its order for relief before the carrier is at liberty in its tariffs to depart from the general rule. The terms of the statute clearly lead to the opposite conclusion. It declares: 'It shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line

"in the same direction, the shorter being included in the longer distance.' Here we have clearly stated what is unlawful and forbidden; and for doing the unlawful and forbidden act penalties are there provided. But that which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated. Should an interested party dispute that the action of the carrier was warranted, an issue would be presented for adjudication, and the risks of that adjudication the carrier would necessarily assume. The later clause in the same section, which empowers the commission to make orders for relief in its discretion, does not in doing so restrict it to a finding of circumstances and conditions strictly dissimilar, but seems intended to give a discretionary authority for cases that could *not be well indicated in advance by general designation*, while the cases which upon their facts should be acted upon as *clearly exceptional* would be left for adjudication when the action of the carrier was challenged. The statute becomes on this construction practical, and this section may be enforced without serious embarrassment."

It was urged upon the attention of Judge Goff that while Judge Cooley had very properly rejected the view that "no exception can be lawful unless made with the sanction of the commission," and had laid it down that the railroads could judge for themselves in some cases, yet he had not ruled that they might do this in all cases, but had distinctly confined their right to relieve themselves from the operation of the general rule, on their own motion, to cases "of *plainly* dissimilar circumstances and conditions," and to cases where the facts were "*clearly exceptional*."

The attention of the Circuit Court of Appeals was further called to the fact that after Judge Cooley had thus construed the statute he proceeded to designate cases that were "clearly exceptional" and "plainly dissimilar" and cases that were not, and also doubtful cases. Amongst many other things he discusses five different classes of cases growing out of competition; and at page 81 says:

"3. The competition with each other of the railroads

"which are subject to the Federal law can seldom, as we think, make out a case of dissimilar circumstances and conditions within the meaning of the statute, because it must be seldom that it would be reasonable for their competition at points of contact to be pressed to an extent that would create the disparity of rates on their lines which the statute seeks to prevent. But we cannot now assume that no case has arisen or can hereafter arise, which, on its own peculiar facts, and in consideration of its special equities, can be deemed to present a just claim under the statute."

Continuing on the same theme, at page 83 he says:

"We do not pass upon those cases finally at this time, and therefore do not undertake to say of them that they constitute cases in which the competition of roads subject to the Federal law creates the dissimilar circumstances and conditions which make up an *exceptional case*. But this brief reference to the facts is suggestive of a possibility at least that the *exceptional case* may exist." * * *

It is clear beyond cavil, then, that by Judge Cooley's ruling the roads could only judge for themselves in "*clearly exceptional*" cases, in cases of "*plainly dissimilar circumstances and conditions*," and that competition between carrier and carrier, subject to the act, as a general rule, would not constitute a "*clearly exceptional*" case, although there was a possibility that such a case might exist.

The roads would now have us believe, in spite of this distinct announcement made by Judge Cooley in an opinion adopted and approved by this court, that in every instance where it can be proved that two or more roads run between different cities in the United States that this is an "*exceptional case*," a strange, unusual, peculiar, and substantially dissimilar circumstance. They insist that such is the meaning of this court in the Alabama Midland case, in spite of the fact that Mr. Justice Shiras went out of his way "to guard against any misapprehension of the scope" of the decision of this court, and expressly confined its operation to "*some cases*," not "*all cases*," and said, in the most guarded language:

"The competition may in *some cases* be such, as having due regard to the interests of the public and of the carrier, ought justly to have effect upon rates, and in *such cases* there is no absolute rule which prevents the commission or the courts from taking that matter into consideration." (168 U. S., 167. *Italics mine*.)

Thus clearly indicating that this court had in mind only "*exceptional cases*" like the one before it in which effective

competition had created beyond doubt substantial dissimilarity.

Hence we respectfully submit that on this question of law as to carrier and carrier there is actually no want of consonance in the two opinions, for while the supreme court was dealing with an "exceptional case," the circuit court of appeals was dealing with one that came within the general rule, both courts applying in the respective cases Judge Cooley's construction of the fourth section, which construction both courts approved and adopted.

However, should this court decline to approve the general rule laid down by the circuit court of appeals, it will not be interfered with in this case, for as applied to the particular facts appearing it is correct, it having been found that the conditions were substantially similar, as matter of fact. A ruling by the court below when applied to the facts of the case is sustained without regard to its correctness as a general proposition.

Spalding vs. Castro, 153 U. S., 38.

Evanston vs. Gunn, 99 U. S., 160.

CIRCUIT COURT OF APPEALS WILL NOT BE REVERSED FOR BASING JUST JUDGMENT ON WRONG REASON.

It is settled law that no judgment shall be reversed when it is clear that the error did not prejudice the rights of the party against whom the ruling was made, and that it worked no injury.

Lancaster vs. Collins, 115 U. S., 222.

Smith vs. Shoemaker, 17 Wall., 630.

Bank of Decatur vs. Home Savings Bank, 21 Wall., 294.

Lyons vs. Phelps, 156 U. S., 202.

A just judgment, which is warranted by the record, will not be reversed because it was based on a wrong reason.

Smiley vs. Barker, 83 F. R., 684, C. C. A., heard before Mr. Justice Brewer and Judges Sanborn and Thayer.

Under these authorities and this well-established principle, it is clear that even if this court should hold that Judge Goff was wrong as a matter of law, it is plain that the roads were not prejudiced.

For in the language of Mr. Justice Shiras in the Alabama Midland case:

"It was not claimed that the defendants were precluded

"from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions by reason of not having applied to the commission to be relieved from the operation of the fourth section." 168 U. S., 168.

On the contrary, this defence of carrier competing with carrier was fully considered by the circuit court of appeals, and as a matter of fact the court held that the competition set up did not affect rates.

In a previous part of this brief we have shown that the evidence fully sustained this finding of fact (see pp. 24-28).

In compliance with the rulings of this court in the Import case, this entire subject of competition that affects rates of every kind and sort set up, was fully and elaborately discussed at the bar and most carefully and conscientiously considered by the court of appeals, as has been already shown herein. Hence no injury whatever has been done to the appellants by these rulings on the law of this case, and this court will not reverse even should they be considered erroneous rulings, for the judgment of the circuit court of appeals is just.

This question has been expressly and specifically passed upon since the decision of this court in the Alabama Midland case.

In the case of *I. C. C. vs. E. T., V. & G. R'y et al.*, 85 F. R., 107, Judge Severens says:

"In the present case the commission put its order upon the ground that the defendant had not the right, in view of the fact that no previous authority had been given by the commission to exercise that privilege, to depart from the rule against charging more for a short than a long haul because of a different condition arising from the competition at Nashville by other carriers, part of whom were railroad companies engaged in through traffic with the East. In this undoubtedly it was in error. The contrary doctrine is now well established. But this error is not material. The legal reason may be wrong and the order right if upon the facts the latter should be found by the court to be warranted by law. Nor would it affect the duty of the court if the commission had founded its order upon one provision of the act and the facts brought the case within some other. The question is whether the order made was a lawful one in the circumstances as they are made to appear."

THE LONG HAUL AND THE LONG LINES.

It may be proper to make a few general observations on the "long haul" and the "long lines," as they are at the bottom of this controversy.

Mr. A. B. Stickney, himself a president of a large western railroad, a heavy owner of railroad property, a man of many years experience in railways, and a leading light in the railroad world, in a very able book called "The Railway Problem," says, at page 52 thereof:

"It seems impossible that any set of men should become so befogged by a form of words as to suppose that it was possible for a railway to haul a ton of freight five hundred miles at substantially the same price as for hauling it two hundred miles, yet a reference to the tariffs of these rail-ways would tend to show that such is the fact.

"This long-haul policy has done, and is now doing, great mischief to the corporations as well as the people."

At page 86 of his book he quotes General D. M. Dodge, president of the Denver City and Fort Worth railway and a director in the Union Pacific railway, as saying:

"To my certain knowledge, the Union Pacific road, of which I am a director, is doing a large amount of its business now as competitive business at a loss, and they have not the nerve to stand up and refuse it, because they are fearful that some other road will get it, and I know today that there is a large demand upon their road for every car they have got, to do a paying business."

In his brief in the court below counsel for the roads went into a disquisition upon the long line being at the mercy of the short line, and the injustice of making it reduce its intermediate rates.

We are informed that in the argument of the *Social Circle case* Mr. Justice Brown asked from the bench, when this view was presented, if the short line was not the natural channel for traffic.

If a short line is not allowed to have any advantage over a long line, what incentive will capital have to build one, and would not competition be thus discouraged and retarded?

Is it not one of the present well-known evils that the railroads, in order now to get the longest haul, take traffic by a circuitous route to far distant points, ignoring the natural outlet?

Is not cotton taken from Columbia hundreds of miles to Norfolk instead of being exported from Charleston, its nearest and natural outlet? Is the act to be construed so

as to encourage this practice? And if so, instead of carrying wheat directly across the country from Chicago to New York, why not ship it by the Illinois Central R. R. to New Orleans, thence *via* Mobile and Jacksonville to Charleston, and from Charleston over the Atlantic Coast line to New York?

There must be a limit to this long-line theory, and it seems wise to have some public body organized to fix it. Congress created the commission for this purpose. But, says my friend, they are useless, because they have no power to make the various roads maintain "*reasonably high rates.*"

This is specious. A greater law than Congress can pass, a greater power than the commission has, a greater law than that of competition, will do this. The universal law of self-preservation. The railroads have yet to show any inclination to disobey the dictates of this law, and so far they have never exhibited any inability to take care of themselves.

In the *Trans-Missouri* case (166 U.S., 330, 331) Mr. Justice Peckham presents this stock argument of the roads with fine irony, in discussing the effect of unrestricted competition. He says the roads urged "that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and while doing so to see its patrons leave for rival roads who are obtaining its business by offering less rates for doing it than can be afforded and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition, efforts will be made in the direction of meeting the underbidding of its rival until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves, so that companies may be allowed to save themselves from themselves and to agree not to attack each other, but to keep up reasonable and living rates for the services performed."

This court appears not to have taken the argument seriously, and at page 338 of the opinion points out that "common interest" and the "exercise of good sense" will produce profitable and reasonable rates.

But all this long-line talk has nothing to do with the case at bar, and is utterly inapplicable. This shipment of Behlmer's was carried over the short line to Charleston. It was not shipped through Nashville, Jackson, Meriden, or Birmingham, but was sent directly from Memphis to Chattanooga, from there to Atlanta, and thence to Augusta, and over the South Carolina road to Summerville. It did not deviate at Augusta and come over the Port Royal and Augusta and the

Charleston and Savannah, thence through Charleston to Summerville. It took the short line; and, according to my friend's own contention, the short line needs no protection; it can take care of itself. There is no possible reason why its intermediate rates should violate the law.

In some cases the long lines may prove sufficient injury to warrant relief in this direction, but the plea is inapplicable to the short line.

THE FINDINGS OF THE CIRCUIT COURT.

In this case the circuit court said: "If the defendants had not consented with each other to lower the rate (from Memphis to Charleston) no hay whatever would come from the hay-producing territory tributary to Memphis, and all the southeast Atlantic States would be compelled to rely on other portions of the West, North or Northeast for hay" (Trans., p. 112).

1. In the court of appeals this was greatly relied on by counsel for the roads as a finding of fact. We suggest, with the greatest respect, that this is not a finding of fact by the circuit court, but a prophecy, pure and simple.

2. This prophecy is completely destroyed as follows:

At page 38, Trans., we find in the answer, section 32: "Respondents aver that *hay is shipped to Charleston, S. C., from Chicago, St. Louis, East St. Louis, Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, Cairo, East Cairo, Belmont, Columbus and Memphis.* * * *

"The all-rail rate on class D (Southern Railway and Steamship Association classification) which includes hay, from Chicago to Charleston *via* Ohio River points, is *33 cents per hundred pounds.* The all-rail rate on hay from *St. Louis* and *East St. Louis* to Charleston is *28 cents per 100 pounds,* or 5 cents per hundred pounds less than the all-rail rate from Chicago to Charleston.

"The all-rail rate on hay from Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, Cairo, East Cairo, Belmont and Columbus to Charleston is *23 cents per 100 pounds,* or 10 cents less than the all-rail rate from Chicago to Charleston." * * *

SEC. 33. "Active competition has existed for many years between Chicago and the above-named cities on the Mississippi and Ohio rivers; and said cities on the Mississippi and Ohio rivers have been in active competition as between themselves in the sale of hay and other farm products in Charleston and other southeastern cities." * * *

It is needless to observe that if "*hay is shipped to Charleston, S. C., from Chicago, St. Louis, &c.,*" at 33c., 28c., and 23c.

per 100, the raising of the rate from Memphis above 19c. would not altogether put a stop to shipments from Memphis. The fact that it does come at higher rates from other places in the same vicinity annihilates this theory. Moreover, we suggest, with great respect, that freight rates are not the only things that cause goods to be shipped from various localities. The price of an article may have something to do with this. And as long as Memphis has an advantage in price of from \$2 to \$5 per ton or an average of \$3.50 over New York, hay will come to Charleston even if freight rates should be raised a cent or so.

This idea is prominently brought out by the chairman at pages 77, 78, Trans.:

"Q. The CHAIRMAN: You would go where you found the best market?

"A. Mr. MOLONY: We would try to.

"Q. The CHAIRMAN: And it would depend on the price of hay to begin with—the production as well as the rates?

"A. Mr. MOLONY: Yes, sir.

"Q. The CHAIRMAN: Have you noticed from time to time—I suppose you give sufficient attention to the subject to enable you to answer as to the relative prices of hay between the two markets, Memphis and New York; how do they compare ordinarily?

"A. Mr. MOLONY: Ordinarily the West is cheaper than they are in New York.

"Q. The CHAIRMAN: Take the two points, Memphis and New York.

"A. Mr. MOLONY: It is cheaper in Memphis than in New York.

"Q. The CHAIRMAN: About what is the usual difference?

"A. Mr. MOLONY: It will vary from two to five dollars a ton.

"Q. The CHAIRMAN: An average of about \$3.50 per ton?

"A. Yes, sir."

3. Lastly, we call the attention of this court to the fact that we have not sought in our pleadings to have the Charleston rate raised, nor has the commission ordered it. We nowhere ask an increase in Charleston rates or San Francisco rates, or Tokio or St. Petersburg rates. In truth, we have not asked that rates to any point be raised.

At page 133, Trans., the circuit court of appeals says:

"It should be kept in mind that the petitioner does not ask that the rate from Memphis to Charleston be changed—that it shall be made less, and consequently unremunerative, or increased, and thereby cause the loss of the traffic—but only that the rate from Memphis to Summerville shall not be greater than the rate to Charleston."

RECENT CASES ON THE FOURTH SECTION.

We preface the examination of these cases by the remark iterated and reiterated by us throughout the entire progress of this cause in the courts below, namely, that the case at bar must be decided on its own circumstances. This, after all, is the main and chief thing laid down in all the cases—the great, final, impregnable ruling of this court and of the English courts. In the language of Mr. Justice Shiras, in the Alabama Midland case:

“ * * * It cannot be doubted, that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case” (*Denaby Main Colliery Company vs. Manchester Railway Co.*, 3 Railway & Canal Traffic Cases, 426; *Phipps vs. London & Northwestern Railway*, 1892, 2 Q. B. D., 229; *Cincinnati, N. O. & Tex. Pac. R. W. vs. Interstate Com. Com.*, 162 U. S., 184, 194; *Texas and Pacific Railway vs. Interstate Com. Com.*, 162 U. S., 197-235). (Trans., 149; 168 U. S., 170.)

The case at bar, then, is not the “Import Rate case” nor the “Party Rate case” nor the “Troy case” nor the “Cincinnati Freight Bureau case,” nor the “Chattanooga case” decided by Judge Severns, but it is the Behlmer case or the “Summerville Hay case,” and is nearly the “Social Circle case” over again.

At page 65, Trans., we find:

“Q. By the CHAIRMAN: Mr. Baxter, this is nearly the Social Circle case over again?”

“A. Mr. BAXTER: Yes, sir.”

With these preliminary statements we will examine briefly three cases which have been decided in the circuit courts since this court delivered its opinion in the Alabama Midland or “Troy case.”

It seems that not being satisfied with the difficulties he has engendered in regard to the true construction of the statute itself, the ingenious counsel for the roads has progressed one step farther and has now involved the lower courts in a controversy as to the true construction of the decision of this court in the Alabama Midland or “Troy case.”

It is not improbable that the next question raised will be the true construction of the construction placed by the lower courts on the true construction of the statute by this court, thus opening up an engaging vista, from the railroad

view, of endless doubt and difficulty. We mention this merely to illustrate the methods used in the set purpose of the roads to cast the enforcement of the law into hopeless confusion.

At any rate, it seems that Judge Speer and Judge Newman and Judge Severens are not at one in their understanding of this court's opinion.

In *Brewer vs. Central of Georgia R'y Co.*, 84 F. R., 258, Judge Speer refuses an application for a preliminary injunction asked for on the bill and answer, and without any evidence at all before him, no testimony having been taken, proceeds to discuss "substantially similar circumstances" at great length, and, curiously enough, does this in the face of copious quotations from the opinion of this court in the Troy case, holding that these "are questions of fact *depending on the matters proved in each case*," and that the courts must give effect "to the findings of fact in the report of the commission as *prima facie* evidence" (168 U. S., 170-175).

It goes without saying that we mean no disrespect by characterizing this action of the learned judge as curious, but it is hard to account for it on any other theory than that he misinterprets the decision of this court.

Another singular feature of this opinion is the argument in a circle by which he shows that low rates would not benefit an intermediate point like Griffin, because, while "Brunswick has the same rates as Savannah, its harbor is as fine as that of Savannah, and yet, not possessing the abounding capital of Savannah, no one can pretend it has been its successful competitor."

Therefore Griffin must not have low rates like Macon because Macon's superior capital would nullify any benefit to Griffin in spite of possessing the same rates. He then proceeds to show that, on the other hand, Griffin should not have the same rates as Macon, because "it would in all likelihood so seriously cripple the business of Macon as to be injurious beyond measure."

Thus, the intermediate locality is not to have low rates because the superior advantages of the larger place could not be affected, and the intermediate locality is not to have low rates because the larger place would be disastrously affected.

The learned judge considered it entirely unworthy of notice that Macon rates need not be raised at all, but that the commission's order could be fully complied with by lowering the rates at the intermediate point, Griffin. The commission in its twelfth annual report calls attention to this; and it is just as well to say now that this is quite a favorite oversight of the roads, and many of the courts have

been misled by the prominence given to the idea in the arguments put forward that rates must be raised at one point while suppressing the fact that they can be lowered at the other.

Having proved by the instance of Savannah and Brunswick that enjoying the same rates does not make two places even commercial rivals, much less commercial peers, the learned judge winds up by asking:

"Shall Government undertake the impossible, but injurious, task of making the commercial advantages of one place equal to those of another. It might as well attempt to equalize the intellectual powers of the people. There should be no attempt to deprive a community of its natural advantages, or those legitimate rewards which flow from large investments, business industries, and competing systems of transportation to facilitate and increase commerce. The act to regulate interstate commerce has no such purpose, and yet this appears to be the inevitable result of the relief the complainants seek in this case, without any adequate corresponding advantage either to themselves or to the community in which they live."

All these calamities, even to the prostitution of the powers of government in this great Republic, are "inevitable," if Griffin gets the same rates as Macon, while at the very same time having identical rates does not equalize Savannah and Brunswick. Perhaps the climate on the coast prevents this.

The next case is the one commonly known as "the Chattanooga case," reported as *I. C. C. vs. E. T., V. & G. R'y Co.*, 85 F. R., 107.

At page 114 Judge Severens says:

"As the circumstances vary infinitely and constantly in the course of such business, it would seem that Congress must have intended something unusual and peculiar out of the ordinary course, not ordinarily incident to the business, as that which would create a substantial dissimilarity for otherwise the vast bulk of transportation would not be subject to the rule at all. The case of *Interstate Commerce Commission vs. Alabama Midland R'y Co.* above cited, is much relied upon by counsel for the railroad companies as giving warrant for the discrimination made in the present case, but the Supreme Court in that case, while reaffirming the doctrine that competition between railway carriers might, and frequently ought to, be considered in adjusting rates under the long and short haul clause, yet took pains to prevent the inference from its opinion that it should be regarded as a controlling consideration."

At page 115 he says:

"If railway carriers engage in a competitive struggle for

"business at a place where they meet and underbid each other or other carriers to a point which is not in itself remunerative can they turn back on the line and, taking advantage of the conditions existing at other localities arising either from the fact that there is no opportunity for competition or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul as shall make good their lack of profits in competitive business and even up the profits on their whole business to the point they set before themselves as reasonable?"

At pages 117 and 118 he says:

"I am aware that the commission in December last, in announcing its opinion in the case of Savannah Bureau of Freight and Transportation *vs.* Charleston and S. R'y Co., evidently disheartened by the adverse rulings of the Supreme Court in recent cases, more especially those of Interstate Commerce Commission *vs.* Cincinnati, N. O. and T. P. R'y Co., 167 U. S., 479, and Interstate Commerce Commission *vs.* Alabama Midland R'y Co., 168 U. S., 144, seems to give up section 4 as of no force or effect in any case where the conditions are not 'substantially similar.' After referring to its former holding that competition between carriers subject to the statute did not create such dissimilarity of conditions as would justify discrimination the commission goes on to say: 'Since then, however, the Supreme Court of the United States, by its decision in the case of Interstate Commerce Commission *vs.* Alabama Midland R'y Co. (decided November 8, 1897), 168 U. S., 144, has determined that this view of the law is erroneous and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law, as applied to the facts found in this case, we are of the opinion that the charging of the higher rate to the intermediate points, as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar then the section does not apply and the carrier is not bound to regard it in the making of its tariffs."

"Now, I do not understand that such a conclusion follows from that decision. On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination whether the conditions are similar, and, if dissimilarity is found, then the further question arises

"whether the dissimilarity is so great as to justify the discrimination which is complained of. The language of the act ought not to be tied up by such literal construction. If it were, then if it should be found that the dissimilarity of conditions is really in favor of the locality discriminated against, the provision would not apply—a result contrary to the manifest intent. In other words my opinion is that the restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be substantially dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made. But the long and short haul clause is only one of the specific provisions employed for the general purpose of the act. The third section underlies the fourth, and supplies the principle on which it rests; so that, if the literal construction referred to be put upon the fourth section, the case would still be exposed to the third section; which forbids undue preference to one locality or the subjection of another to any undue disadvantage."

In this case Judge Severens reviews and considers "the whole body of the evidence" as he says, quoting the Supreme Court, and concludes that the haul complained of was under "substantially similar circumstances and conditions."

Amongst other things he alludes to the remarkable fact that while Nashville has but one railroad and Chattanooga has "many more railroads," yet the roads do not choose to compete at Chattanooga (85 F. R., p. 116), and Nashville, the longer-distance point, receives a lower rate. Thus while the conditions are substantially dissimilar at Chattanooga, and the dissimilarity is strongly and substantially in favor of that place because of numerous railroads centering there and for other reasons pointed out by the court, nevertheless Nashville is given a far lower rate.

This extraordinary fact undoubtedly prompted Judge Severens to hold that the Supreme Court could not have meant in the Alabama Midland decision that in all cases where there is a substantial dissimilarity the act is abrogated. It could not have meant that where the substantial dissimilarity existed in favor of the locality discriminated against the provision would not apply. This would be contrary to the manifest intent (85 F. R., 118).

In discussing this opinion of Judge Severens counsel for the roads contended before Judge Newman that it necessitated reading a judicial amendment into the fourth section of the act.

This is by no means true, and this court has laid it down in numerous cases that—

“General terms should be so interpreted in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted ‘that whoever drew blood in the streets should be punished with the utmost severity,’ did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling cited by Plowden, that the statute of first Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire, ‘for he is not to be hanged because he would not stay to be burnt.’”

U. S. vs. Kirby, 7 Wall., 482.

Holy Trinity Church vs. U. S., 143 U. S., 461.

The Chattanooga case was appealed by the roads, and has been argued and submitted to the circuit court of appeals for the sixth circuit. No decision has yet been rendered by that court.

The next case is that of *The Interstate Com. Com. vs. Western & A. R. Co.*, 88 F. R., 186.

On a review of the evidence Judge Newman decided that the circumstances and conditions were substantially dissimilar and he decided in favor of the roads.

At page 195, 88 F. R., Judge Newman quotes the language of Judge Severens, hereinbefore set out, and says:

“This view of the law suggested by Judge Severens, it is submitted, with the utmost deference, is not the view adopted by the court, or, indeed, by the Interstate Commerce Commission itself. The view generally entertained is that, if the circumstances and conditions at the longer-distance point are substantially dissimilar from those at the shorter-distance point, the fourth section of the act is inapplicable.”

This case has also been appealed, but no decision has yet been rendered by the circuit court of appeals.

This concludes an examination of all the cases decided since the Alabama Midland decision.

Now, whether or not this court shall ultimately hold that the fourth section, although it is remedial, shall be strictly construed and literally interpreted, as counsel for the roads

contends, and as he has induced Judge Newman to hold, or whether the construction of the act by Judge Severens in the light of the Alabama Midland decision, as he reads it, shall prevail, it cannot affect the case at bar in either event.

For it has been decided as a matter of fact from the "entire body of the evidence" that the circumstances and conditions in this case are substantially similar. This finding of fact by the circuit court of appeals, concurring with the commission, is sustained by the testimony and is unassailable.

So all the requirements, either under a literal or a liberal construction of the fourth section, are fulfilled, and this case comes clearly within the ambit of the act. Every case must turn on its own facts, and this case must be determined without regard to the circumstances and conditions in any other case.

Furthermore, it must be decided upon the record "in the light of all the facts duly alleged and supported by competent evidence" (162 U. S., 197). Nothing outside of the record can be considered.

COMPETITION BY RIVAL LINES NOT CONTROLLING ONLY ONE OF MANY ELEMENTS.

In passing, it may be well to say, however, that outside of the fact that a remedial statute is to be liberally construed, Judge Severens finds strong, if not conclusive, confirmation of his views in the following cases: In *Detroit, Grand Haven & Milwaukee R. R. vs. Interstate Commerce Commission*, 43 U. S. App., 308, The Circuit Court of Appeals, 6th circuit, says:

"And there is not any doubt that whatever may have been thought heretofore on the point in England, now competition of rival lines is *one* of the circumstances that must be considered, *not as controlling, but as an element along with others* to justify the discrimination of which complaint is made." (Italics mine.)

This decision was affirmed by the Supreme Court in *Int. Comm. Com. vs. D., G. H. & M. R. R.*, 167 U. S., 638. In *Phipps vs. London & Northwestern Railway*, 1892, 2 Q. B. D., 229, Wills, J., says:

"Although *effective competition with another railway or canal company will not of itself justify a preference, which is otherwise quite beyond the mark*, yet, still it is not a circumstance that can be thrown out of the question, and I think there is abundance of authority for that."

This language was quoted with approval by this court in the Import Rate case, 162 U. S., 197.

SUMMERVILLE IS NOT A COMPETITIVE POINT.

My friend uses the argument that Summerville is not a competitive point.

This is our very grievance. We complain on the ground that we are not allowed to compete. It surely is not the fault of Summerville. The roads, having tied her hand and foot, now accuse her and blame her because she can't run. This is adding insult to injury with a vengeance.

The sixth circuit court of appeals says:

"It does not, then, become a matter of competition and business rivalry, but substantially of the annihilation of the business of this company at that point, or, more intolerably, a denial to this company of the right to compete with its rivals as it now may" (*D. G. H. M. R. R. v. I. C. C.*, 43 U. S. App., 308; affirmed, 167 U. S., 633).

If this be true as to railroads, is it not equally true and intolerable as to towns?

Again, speaking of competition, Judge Hammond says, in the same case:

"The statute cannot be violated merely to get traffic from a rival by giving lesser rates than to people more favorably situated; cannot bleed Ionia to make up for the misfortunes of competition at Grand Rapids, for Congress has prohibited such a practice, but it has not prohibited the carrier from resorting to a cheaper method of securing access at Grand Rapids than one more costly."

Under this decision the roads cannot bleed Summerville to make up for the misfortunes of competition at Charleston. And, as we have shown in the case at bar, we have chimerical competition, not real and actual.

And Judge Severens says: "If railway carriers engage in a competitive struggle for business at a place where they meet, and underbid each other or other carriers to a point which is not in itself remunerative, can they turn back on the line, and, taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition, or from the fact that by concert of carriers there is none, charge such rates for the shorter haul as shall make good their lack of profits in competitive business, and even up the profits on their whole business to the point they set before themselves as reasonable?" (*I. C. C. v. E. T., V. & G. R'y Co.*, 85 F. R., 115).

And this court says:

"That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether

"the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage *the welfare of the communities occupying the localities where the goods are delivered* is to be considered as well as that of the communities which are in the locality of the place of shipment" (162 U. S., 233. Italics mine).

In the case at bar Summerville is the place where the goods are to be delivered, and her interests are to be considered, and her commerce is not to be hampered or destroyed. It will be recalled by this court that in the Social Circle case it was claimed that the all-rail rates from Cincinnati to Augusta had to be reduced to meet the rail and ocean rate from Baltimore via Charleston to Augusta, and that the influence of the ocean extended as far as Augusta.

It is extraordinary, then, that in the case at bar the influence of the ocean stops at Charleston and does not extend to Summerville, which is within sound of the surf.

HOW RAIL AND WATER COMPETITION CAUSED RATES TO BE REDUCED.

In the court below counsel for the roads said in his brief:

"The rate from Memphis to Charleston was reduced from 23 cents to 19 cents in 1891 on account of the movement by rail and water lines; and, if this rate were restored to 23 cents, the traffic would go back to the water lines" (Trans., pp. 77, 71; 78, 72 *here.*)

At page 78, Trans., we find:

"Q. Mr. BAXTER: Mr. Jackson, I wish you would explain to the commission when this rate was made 19 cents, and whether it was higher or lower before.

"A. Mr. JACKSON: The rate of 19 cents from Memphis to Charleston was reduced from 23 cents to 19 cents in August, 1891. *That is my recollection.* That reduction was made necessary on account of the movement by the rail and water lines. We were carrying a 4-cent higher rate from Memphis and Ohio and Mississippi River points than we are now carrying. It was necessary to reduce them to meet this water and rail competition."

It will be observed that Mr. Jackson does not speak positively, but contents himself with saying, "*That is my recollection.*"

Mr. Jackson says the rates were reduced in 1891 from

Ohio and Mississippi River points, according to his "recollection." Let us take the two points of St. Louis, on the Mississippi, and Louisville, on the Ohio.

The present (1893, date of testimony) *reduced?* rates are (Trans., p. 59):

<i>Reduced?</i> rate, 1893, St. Louis to Charleston	.....	28c.	per 100 lbs.
Before reduction, 1888, " " "	.....	25c.	" " "
<i>Reduced?</i> rate, 1893, Louisville " " "	.....	23c.	" " "
Before reduction, 1888, " " "	.....	20c.	" " "

Mr. Jackson's "recollection" seems again at fault. The information as to the rates of 1888 is to be found as follows:

In the case of Tariffs and Classifications, Atlanta & West Point R. R., 3 I. C. Com. Rep., p. 45, the commission says:

"There is, for example, proof of the existence of considerable freight traffic from Chicago, *St. Louis* and other points in the Western States to *Charleston*, Savannah, Brunswick and other points on and near the Atlantic seaboard, consisting of packing-house products, flour, grain, etc. Taking as an illustration class D (grain), the rate, as established Sept. 30, 1888, by the Southern Railway and Steamship Association, over these and other lines from *St. Louis* to the Atlantic Coast points referred to, was 25 cents." * * *

At page 32 of this case, 3 I. C. Com. Rep., we find:

"Taking *Louisville* as a sample of the Ohio River and western points, the Southern Railway and Steamship Association pamphlet gives lower rates to southeastern coast points than to any, even the competitive interior points. The first-class rate to Savannah, Port Royal, *Charleston* and Brunswick, is 95 cents. The rate on class D (corn, etc.) to the same points, in December, 1888, was 20 cents."

A RATIONAL SYSTEM BY WHICH THE FOURTH SECTION IS COMPLIED WITH IN OTHER PARTS OF THE COUNTRY.

At page 54, *In re L. & N. R. Co.*, 1 I. C. C. R., Judge Cooley says:

"The commission is informed that the interstate roads "north of the Potomac and the Ohio, and east of the Missouri with substantial unanimity, have conformed to the "requirements of the fourth section by putting in force "tariffs rearranged accordingly. Some friction was manifested for a time, arising largely from the discontinuance "of special rates, favors, and privileges, and from the adoption of new classifications; but where the fourth section "has thus been made operative very few instances have "come to our attention of injury thereby occasioned."

It can hardly be that railroad men in the territory north of the Ohio are less intelligent than those in the South, and less capable of understanding their true interests, and that by adopting this system they have sacrificed their property. If they could find a method of complying with the law, it seems that the roads in this region could do likewise.

The system adopted in the trunk line and central traffic territory and the New England States—that is, the territory north of the Ohio and Potomac—is that of percentages, and is a perfectly fair, safe, wise, and satisfactory system, and under it the fourth section is fully observed.

It is thus described at page 88, Trans.:

"Answer. The rates from the Central Traffic Association territory to the trunk line and New England territory are made as follows:

"The rates from Chicago to New York are fixed by what is known as the joint committee, which is a committee representing the Trunk Line and Central Traffic Associations, and also includes certain New England roads, and others which are not members of either of the above-mentioned associations. These rates between Chicago and New York city are the basis of all other rates from points in this central traffic territory to eastern points. Boston being made certain differentials higher than New York city, and Baltimore, Philadelphia, and other principal points certain differentials lower. Rates to local points in these territories are made either the same as the above-mentioned points, or certain differentials higher or lower. Intermediate points on the direct line are usually made the same as the terminal points, or lower. For instance, points in the vicinity of New York, Philadelphia, Boston and Baltimore, usually take the same rates as these cities, or a lesser rate, the farther west they happen to be situated, until the western boundary of the trunk line territory is reached. From all other points in the Central Traffic Association territory than Chicago, the rates to the trunk line, New England territory, are made a percentage of the Chicago and New York rate. For instance, Peoria, Ill., which is west of Chicago, is a 110 per cent. of this rate, or 10 per cent. higher than Chicago. Terre Haute, Ind., takes a hundred per cent. of the Chicago rate, or the same as Chicago; Columbus, O., takes 77 per cent. of the Chicago rate, being farther east.

"Question 7. How does this system affect long and short hauls?

"Answer. Under this system throughout the territory mentioned the rates for shorter distances are generally not higher than for the longer distances; the intermediate points

usually taking the same or lower rate than the principal terminal point.

"Question 8. Give some instances of intermediate points taking the same rate as the terminal.

"Answer. Exhibit B shows certain intermediate points taking the same rates as New York, Philadelphia, Baltimore and Boston, also the distances from those points and the roads on which said points are situated."

Exhibit B, page 89, Trans., shows:

"Points on the Pennsylvania railroad taking New York rates on shipments of freight from Central Traffic Association territory:

"Elizabeth, N. J., 14 miles west of New York.

"Menlo Park, N. J., 24 miles west of New York.

"Trenton, N. J., 56 miles west of New York.

"Points on the Pennsylvania railroad, taking Philadelphia rates:

"Frazer, Pa., 24 miles west of Philadelphia.

"Columbia, Pa., 80 miles west of Philadelphia.

"Points on the Baltimore and Ohio railroad taking Baltimore rates:

"Annapolis Junction, Md., 17 miles west of Baltimore.

"Washington, D. C., 40 miles west of Baltimore.

"Rockville, Md., 56 miles west of Baltimore.

"Harper's Ferry, W. Va., 95 miles west of Baltimore.

"Cumberland, Md., 192 miles west of Baltimore.

"Points on the Boston and Albany railroad, taking Boston rates:

"Worcester, Mass., 44 miles west of Boston.

"Brookfield, Mass., 67 miles west of Boston.

"Springfield, Mass., 99 miles west of Boston.

"Westfield, Mass., 108 miles west of Boston.

"Dalton, Mass., 145 miles west of Boston.

"Chatham, N. Y., 177 miles west of Boston."

It is hard to see, if such a system prevails elsewhere, why it should not be put in operation south of the Ohio and Potomac rivers. It complies with the law, works beneficially for the roads, and is fair to the public.

Counsel for the roads usually relies on these two reasons for not adopting it in the South:

1. That the Pennsylvania road put this system in operation prior to the passage of the interstate commerce law because its business had developed in volume and extent, especially its local business, to such a point that it could do so with profit and advantage. In fact, it was the best policy under such conditions, as it would be for any road running through a densely populated district.

2. That, owing to the prevalence of rivers and waterways

in the South, the competition is too great to allow the putting in force of such a system (Mr. Baxter's Brief, 134).

Reason No. 2 hardly deserves notice, for it is a matter of public knowledge, and a fact of which this court will take judicial notice, that the territory north of the Ohio is penetrated in every direction by navigable rivers—the Delaware, the Hudson, the Susquehanna, Alleghany, Monongahela, the Connecticut, Penobscot, and other great streams; that it is surrounded by the Great Lakes, the finest inland waterway in the world, the St. Lawrence, the Mississippi, and the Ohio and Potomac rivers and the ocean, and that great bays, such as the Chesapeake and Delaware, and great sounds, like Long Island sound, enter into it; that it has canals like the Erie canal and lakes like Lake Champlain; and, in fact, its waterways are larger, finer, and more highly improved than those in the South; that New York State, the heart of this territory, has for two-thirds of its boundaries navigable rivers and a total water frontage of 880 miles.

It is idle, therefore, to assert that the roads in the South meet with more water competition than the roads in the North. The reverse is true.

As to reason No. 1, about the Pennsylvania road, it seems, according to Judge Cooley, that all the roads north of the Ohio conformed to the fourth section after the passage of the act to regulate commerce and not before. However, there are many other roads in this territory besides the Pennsylvania, and they made the change after the law was passed and in obedience to its mandate.

As to the density of population in the North my friend is mistaken. That is, in proportion to the mileage, a most important particular.

Strange as it may seem, there are more people in proportion to the mileage in groups IV and V, comprising the States south of the Ohio and east of the Mississippi, excluding the State of Florida, than in groups II and III, comprising the States north of the Ohio and east of the Mississippi and excluding the New England States.

That is, the statistics show that in groups IV and V, excluding Florida, there are 10,000 people to every 20.21 miles of road, while in groups II and III there are 10,000 people to every 20.88 miles of road.

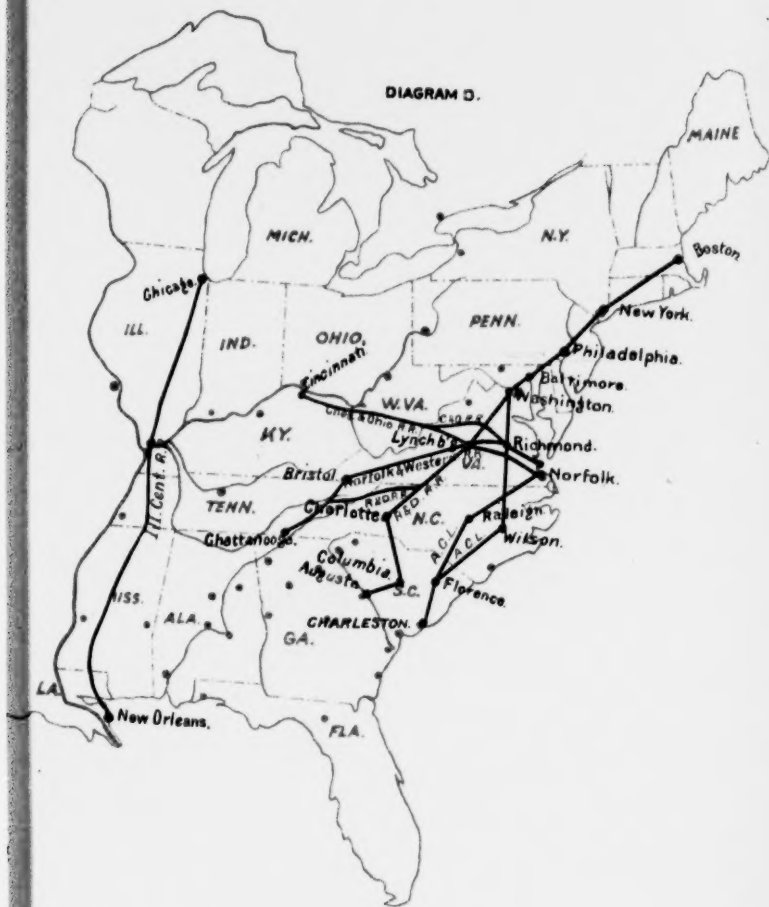
In other words, in the Southern States there are more people to support the roads than in the North, proportionately.

That population is an important factor to be considered has been decided in the Reagan case, 154 U. S., 408, where the court says:

"May not the building of those other roads have increased



DIAGRAM D.



the population and business to such an extent, that the overflow has, so far from diminishing, really resulted in an increase of the business of the International and Great Northern. (Italics mine.) (See also Smythe vs. Ames, 169 U. S., 540.)

We get our data for this statement about mileage and proportionate population from Statistics of Railways, p. 11, published by I. C. C., 1894.

As to the great local traffic of the Pennsylvania road, of which there is no evidence in this case, we say the statistics do not indicate such a great difference between the groups, and that the average haul of one ton is not much longer in groups IV and V than in groups II and III. At page 54, Statistics of Railways, we find average haul per ton :

Group II, 109.66 miles.

Group III, 117.07 miles.

Group V, 113.18 miles.

Group IV, 174.01 miles.

These statistics indicate that in group X (California, &c.) there is a great deal of long-distance traffic, the average haul there being 213.88 miles.

ROADS IN THE SOUTH THAT CONFORM TO FOURTH SECTION.

Recognizing the truth that comparison with roads not in the same territory is of little value, as the commission and the courts have held, we show in Diagram D some roads in the South that have conformed to the fourth section with good results to themselves.

Judge Cooley, speaking of the Richmond and Danville, says :

"After the orders which were made for relief under the fourth section of the act had expired *the defendant entered upon an extensive revision of its tariff sheets* in the direction of bringing them more nearly into conformity with the general rule prescribed by that section and *with the result that there is not now any point on the line of defendant's roads north of Columbia, S. C., to which a consignment at the established rates would result in a greater charge being made for the shorter haul of the like kinds of property on the same line and in the same direction.* This result has been brought about principally by a gradual reduction of the rates at non competitive points, and, though some increase in rates has been made at some of the competitive points, the increase has not been general, nor in any case which has been brought to our attention has it been very great. The charges, however, being in the direction of equalizing railroad advantages as

between competitive and non-competitive points must necessarily to some extent prejudice the jobbing interests of towns situated as Danville has been, not only because they render it possible for rival establishments to spring up and maintain themselves in the smaller towns, but because the retailers in the smaller towns under the favorable rates which are now given them are enabled to deal directly in larger and more distant markets. Nobody can justly complain of a railroad company for so equalizing its rates as to render this possible, for the law had such an equalization of rates as one of its leading purposes and provided for it because justice as between the competitive and non-competitive points seemed in the opinion of the legislature to require it."

Crews vs. R. & D. R. R., 1 I. C. C., 409.

The commission *in re* tariffs and classifications Atlanta and West Point R. R. Co., 3 I. C. Com'r Rep., p. 19, says:

"In all this business between the Atlantic seaboard and the Western and Southwestern States handled in competition with the trunk lines (of which, in fact, the Chesapeake and Ohio may be called one) the principle of obedience to the requirements of the fourth section of the act to regulate commerce is preserved; in other words, in making rates over this line between the Western and Southwestern States and local points in Virginia situated upon the Chesapeake and Ohio and Richmond and Alleghany roads the tariffs do not show that rates are higher to intermediate points than to more distant points over the same line" (3 I. C. C., 34).

"The interstate traffic of the Norfolk and Western is considerable in both directions. In many respects, it is conducted in conformity with the principle of the short-haul clause of the act.

"Rates to and from points east of Petersburg are no higher than to and from Petersburg; to and from points east of Lynchburg, are no higher than to Lynchburg; and the same is true of intermediate points east of Roanoke and of Bristol, respectively" (3 I. C. C., 35).

"Rates in the reverse direction to distant western and southwestern points are generally made, observing the short-haul principle of the law, so far as the point of shipment is concerned; that is, no more is charged from intermediate points upon the Norfolk and Western road than from other points more distant over the same line" (3 I. C. C., 39).

"The earnings of this road, both gross and net, have been very considerably increased during the period since the act to regulate commerce took effect" (3 I. C. C. R., 39).

Atlantic Coast Line and Seaboard air line (3 I. C. C. R., 44):

"The situation of these lines is quite peculiar, as rates to and from the eastern cities are largely available at coast points." * * *

"The violations of the fourth section are not many. Nor does the disparity between the points affected by ocean rates and interior points appear to be extreme, so far as the rates have been examined by the commission."

"* * * the Queen and Crescent, local rates have been established, which are progressive in their form, and not violating the general rule of the fourth section of the act except at river points.

"Its officers are quite ready to say that the changes which it has made in the direction of conformity to the law have not been detrimental to its revenue, but, on the contrary, have benefited the carrier, and have produced a feeling of satisfaction along its line, which is of material assistance to the prosperity of the road" (3 I. C. C. R., 85).

"Similar results have been experienced by the Illinois Central and other southern roads, which have entered upon the same policy.

"So far, therefore, as the experience of carriers during the time since the passage of the act has developed results consequent upon the actual introduction and application of the short-haul rule, it is clear that the evils anticipated were, to a large extent, non-existent, and that the relations between the carriers and their patrons have been quite materially improved" (3 I. C. C. Rep., 85).

Now, my friend, in his very able brief, has said the commission orders a ruinous reduction without suggesting a remedy. He is quite in error in this, for at pages 48 and 49 of the Atlanta and West Point case the commission say:

"Moreover, the adjustment required does not necessarily involve an immediate loss of revenue. An advance of a single cent, for example, on the various classes and specials composing the large interstate traffic to and from Atlanta would compensate the carriers for very considerable reductions on the comparatively light interstate traffic which is now carried to local points on the Atlanta combination.

"The operation of this system in the Eastern and Western States, by way of developing local communities, has wrought benefits to the country at large, which are obvious to the most superficial observer."

If, as General Manager Ward says, this grain and hay traffic constitutes three-fourths of the business of the road, and the amount taken to Charleston exceeds all of the busi-

ness at local stations (Trans., pp. 74 and 75) by increasing the rate to Charleston by one cent, as the commission suggests, it would be the means of obviating an immediate loss of revenue.

At any rate, we confess our inability to see why these roads cannot do as the Richmond and Danville and the Atlantic Coast line have done in this territory.

UNREASONABLENESS AND UNLAWFULNESS OF ADDED LOCAL OR SOUTHERN SYSTEM OF RATE- MAKING.

The first proposition on this branch of the controversy is that the rates in this case are wrong in principle, and that necessarily the operation of a false principle or system produces unreasonable results, namely, the rates in this case. This is an important matter, because it involves the legality of the Southern system of rate-making.

The case at bar is a very clear illustration of the subject in all its phases, and we are fortunate in having the facts indisputably established. The rates in this case and throughout the South are made in the following way:

In his petition before the commission Behlmer, after stating in paragraphs 6 and 7 that he was forced to pay 28 cents per hundred, or \$56 per car-load, on hay and grain to Summerville, the shorter distance, whereas it was hauled to Charleston, the longer distance, for 19 cents a hundred, or \$38 per car-load, alleges:

"9. For a further complaint your petitioner alleges that he is informed and believes that the additional 9 cents per hundred which he is forced to pay is a so-called local rate from Charleston to Summerville, a distance of 22 miles, whereas the through rate from Memphis to Charleston is 19 cents per hundred, the distance being 771 miles; that said local rate is imposed by the South Carolina Railway Company or its receiver, who now operates the road, or by the Southern Railway and Steamship Association.

"10. Your petitioner alleges that on its face this so-called local rate of 9 cents per hundred for 22 miles is excessive and unreasonable, and the aggregate charge of 28 cents per hundred from Memphis to Summerville is excessive and unreasonable and in violation of section 1 of the act of Congress of February 4th, 1887, entitled An act to regulate commerce, which provides, &c." (Trans., p. 8):

This charge is reiterated in section 10 of his bill of complaint filed in the Circuit Court (Trans., p. 5). This is admitted in the joint and several answer in section—

" 25. Respondents aver that the rate of 28 cents per 100 pounds on hay from Memphis to Summerville is, as stated above, a combination rate; that it is arrived at by taking the joint through rate of 19 cents per 100 pounds from Memphis to Charleston and adding thereto the local rate of the South Carolina railroad of 9 cents per 100 pounds from Charleston to Summerville, thus making a total combination rate of 28 cents per 100 pounds from Memphis via Charleston to Summerville (Trans., p. 36).

" 24. Respondents aver that it is 21 miles from Charleston to Summerville. The local rate charged by the South Carolina railway on hay from Charleston to Summerville is 9 cents per 100 pounds. The standard tariff of the South Carolina railroad commission, referred to above, allows the railroads of that State to charge on hay a rate of 9 cents per hundred pounds, for a distance of 21 miles, and said tariff was adopted, as stated above, under a law of that State which authorized and required said commission to make just and reasonable rates" (Trans., p. 36).

These allegations and admissions are fully sustained by the evidence (Trans., pp. 50, 51, 53, 61, 65, 66, 67).

On the testimony the commission found this as a fact (Trans., pp. 20, 21).

The evidence shows that the freight is not transported to Charleston and back again to Summerville, but that the cars are switched off at Summerville in accordance with the usual practice at all intermediate stations—that is, \$18 per car-load is charged and collected for a purely constructive or imaginary haul (Trans., pp. 51, 75).

Such are the facts showing the method or system of rate-making in this case and in this section, and it would be unnecessary to add anything further to the statement, were it not for something that occurred in the Circuit Court of Appeals.

We there urged that the transportation from Memphis to Summerville, through the States of Tennessee, Mississippi, Alabama, Georgia, and South Carolina, a journey from the Mississippi river to a point within sound of the surf of the Atlantic ocean, could not be regarded or treated as local in any respect. We pointed out that—

In the Social Circle case, p. 398, I. C. R., & 162 U. S., p. 191, Mr. Justice Shiras said: "Upon this part of the case the conclusion of the Circuit Court was that the traffic from Cincinnati to Social Circle, in issue as to the Georgia Railroad Company was *local*, and that that company was not, on the facts presented, made a party to a joint or common arrangement such as make the traffic to Social Circle subject to the control of the Interstate Commerce Com-

"mission. We are unable to accept this conclusion." (Italics mine.)

That Mr. Chief Justice Fuller in *Leisy vs. Hardin*, 135 U. S., 109, after reviewing all the cases, had said: "But the transportation of passengers or of merchandise from one State to another is in its nature national." * * *

That in *Gloucester Ferry Co. vs. Penn.*, 114 U. S., 196, this court said: "And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation."

That in *Phila. Steamship Co. vs. Penn.*, 122 U. S., 336, this court said: "To apply the language of Chief Justice Marshall, *fares and freights for transportation in carrying on interstate or foreign commerce* are as much essential ingredients of that commerce as transportation itself." (Italics mine.)

That in the *Wabash* case, 118 U. S., 571, the Supreme Court, speaking "of a continuous transportation of goods from New York to central Illinois, or from the latter to New York," says: "Whatever may be the instrumentalities by which this transportation from one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi river." It is therefore free from "*local rules and local regulations*," "concerning the price, compensation or taxation, or any other restrictive regulation" * * * as to "*fares and charges*" and "*rates of transportation*" (118 U. S., 572-577). (Italics mine.)

We showed that this *Wabash* case had been cited and approved by the Supreme Court in twelve subsequent cases, and we elaborately reviewed all the cases on the point from *Gibbons vs. Ogden*, 9 Wheaton, 195, down, and established that the irresistible deduction was that there must be interstate rates for interstate commerce, and that a through interstate rate is a matter of national concern, an essential part of interstate commerce, and a wholly distinct and different thing from a local rate, and that it is illegal in principle to subject it to any local rule or local regulation, even though the same be a local rate of 9 cents imposed by virtue of a State law. Or, to use the language of the answer (sec. 24, Trans., 36):

"The local rate charged by the South Carolina railway on hay, from Charleston to Summerville is 9 cents per 100 pounds. The standard tariff of the SOUTH CAROLINA RAILROAD COMMISSION, referred to above, allows the railroads of that State to charge, on hay, a rate of 9 cents per hundred pounds, for a distance of 21 miles; and said tariff was adopted as stated above,

UNDER A LAW of that State, which authorized and required said COMMISSION TO MAKE JUST AND REASONABLE RATES."

That the combination of a national interstate rate and a local rate was bound to produce a base metal an alloy, just as certainly as the mixture of silver and lead; that the result of such miscegenation must be injurious and unjust to both national and local traffic.

Driven by the force of this argument, the general outline of which we have given, counsel for the roads filed a supplemental brief in the Circuit Court of Appeals, completely altering his position, as will be seen by the reply we made, which is here inserted in order to prevent any possibility as to confusion or mistake upon the facts of this added local system, which is the root of all trouble as to rates in the South.

In reply to this supplemental brief we said:

"My friend now says the local is imposed by virtue of a common law power in the Memphis & Charleston R. R. to employ agents, and pay them 9 cents, or any other sum. The only trouble about this wholly new contention is that it is not founded on fact. In truth, it is diametrically opposed to my friend's evidence and his admissions, set out in full at pages 6 to 14, part II, of my brief, in which he maintains that this is a combination rate. But let us quote. At p. 13 of my brief we find, sec. 25, of the answer taken from p. 33, Trans., as follows:

"Respondents aver that the rate of 28 cents per 100 lbs. on hay from Memphis to Summerville is, as stated above, a combination rate; that it is arrived at by taking the joint through rate of 19 cents per 100 lbs. from Memphis to Charleston, and adding thereto the local rate of the South Carolina railroad of 9 cents per 100 lbs. from Charleston to Summerville, thus making a total combination rate of 28 cents per 100 lbs. from Memphis *via* Charleston to Summerville.'

"Please observe that the answer says '*via Charleston to Summerville.*' Now my friend makes a complete change of front, and says 'the charge referred to is not collected for a "constructive or imaginary haul from Charleston to Summerville," but is collected for an *actual* haul from Augusta to Summerville.' (See p. 14, Supplemental Brief.)

"The evidence in this case clearly shows that through rates are made to Charleston, and, as the answer says, p. 32, Trans., the S. C. R. R. received, 'in addition to its proportion of said through rate, its local from Charleston to Summerville.' (See also sec. 24, ans., Trans., 33, p. 13, Brief.)

"It is too late now, and, in the face of all this, to take the

"position that, under a common-law power, the charge was
 "from Memphis to Summerville, when it is admitted and
 "asserted, for the purpose of showing the now exploded
 "theory, that the carriage was not over the 'same line;'
 "that no through arrangement existed except from Mem-
 "phis to Charleston, for which a through charge was made
 "of 19c., while for the '21 miles' from Charleston to Sum-
 "merville the local of 9c. was imposed by the South Caro-
 "lina road alone, and no other road had any interest in it,
 "or had anything to do with it. Never was a fact more
 "clearly established than that this was the separate action
 "of the South Carolina road, and that the other roads had
 "nothing to do with it in any way, shape or form.

"It may be that the Memphis and Charleston road 'had
 "the right to employ the South Carolina railway as one of
 "the "agencies" to complete the transportation;' and it
 "may be that it had the right to agree to pay the South
 "Carolina railway the local rate of '9 cents per 100 pounds,'
 "or \$9 per hundred pounds, but unfortunately no such
 "thing has occurred in this case.

"The roads have themselves taken the pains to prove be-
 "yond a shadow of doubt that this local was the private
 "and separate and exclusive business of the South Carolina
 "railway.

"That they have nothing whatever to do with it; that
 "they had entered into an agreement as to interstate freight
 "between Memphis and Charleston and Augusta, but Sum-
 "merville is not on the list. That point is private to the
 "South Carolina road.

"They have induced the circuit judge in this case to say:
 "'It would appear from the evidence in this case that these
 "'defendants had no common controlling head; that they
 "'were independent of each other, and that acting inde-
 "'pendently they had so arranged their charges of freight
 "'on hay and articles of this character, that 19 cents per
 "'hundred would be divided between them for transporta-
 "'tion between Memphis and Charleston. They had similar
 "'contracts from Memphis to Chattanooga, to Atlanta, to Au-
 "'gusta. But these contracts did not include any interme-
 "'diate points. In the case at bar all that was received by
 "'all these connecting roads was 19 cents per hundred. The
 "'South Carolina Railway Company shared in this. In ad-
 "'dition that this railway company charged nine cents be-
 "'cause the shipment was to Summerville, and this nine cents
 "'it shared with no one. Strictly speaking, therefore, the de-
 "'fendants did not charge for anything but transportation
 "'between Memphis and Charleston. There was no arrange-
 "'ment between them for any other through rate to any point

“ in South Carolina than Charleston, and no authority in
 “ any one to change or enlarge the terms of the contract.
 “ Certainly the shipping agent in Memphis could not do it.
 “ He may very well have said to one who desired to ship hay
 “ into South Carolina, and who wished to avoid the local
 “ rates on each road, I can do this for you ; we have through
 “ rates to competitive points. I can give you the benefit of
 “ the through rate to Augusta, or I can give you the through
 “ rate to Charleston. My authority goes no further. I can
 “ put your freight within reach of you on the South Carolina
 “ railway, and can bind this road only as to the rate to
 “ Charleston. When you get it there you may contract
 “ with the South Carolina Railway Company. The South
 “ Carolina Railway Company itself could say to its con-
 “ tracting roads, We are perfectly willing to contract with
 “ you for a through rate to Charleston. There we meet
 “ competitive carriers and competing markets, and if we do
 “ not meet you in lowering the through rates, you, and we
 “ as well, will lose business. But we will not agree to
 “ through rates to points where we have no competition,
 “ and especially to points on our road. Freight to those
 “ points and charges for transportation are our own busi-
 “ ness, and no one else is concerned in it’ (Trans., p. 110).

“ My friend now concedes that an interstate rate is a
 “ matter of national concern, even as to points like Summer-
 “ ville. The circuit judge is left in the lurch, and all the
 “ testimony and all the admissions are ignored, and the
 “ local, instead of being the act of the South Carolina road,
 “ in dealing with its private affairs, is now the act of the
 “ Memphis and Charleston R. R., under its common-law
 “ power to employ such agencies and pay such prices as it
 “ pleases.

“ The spectacle is amusing.”

There can be no room for doubt, then, as to how this rate
 of 28 cents complained of in this case is made up. It is a
 combination rate constructed from the through interstate
 rate of 19 cents, with the added local of 9 cents.

ADDED LOCAL EXACTED ON THROUGH TRAFFIC UNREASONABLE PER SE. INTERSTATE RATES FOR INTERSTATE TRAFFIC.

The entire fallacy of my friend's position is in asserting
 that the haul from Memphis to Summerville is local, while
 the haul from Memphis to Charleston is not, and that the
 Summerville haul being local, it is reasonable and proper
 to impose a local rate upon it.

The premise is faulty, as is manifest by the mere fact of mentioning that the haul from Memphis to Summerville in the case at bar was 750 miles, through the States of Tennessee, Mississippi, Alabama, Georgia, and South Carolina. As we have seen above, this court, in the Social Circle case, held it was not local.

This is an interstate through haul and not local in any sense. Hence, all conclusions predicated on the fact that it is local transportation are obviously erroneous, and among these conclusions is the idea that a local rate prevailing in South Carolina and made and constructed for local conditions in that State can be imposed on this traffic.

As restricted to a transportation which begins and ends within the limits of the State, this nine-cent local may be very just and equitable, but, as Mr. Justice Miller said in the Wabash case (188 U. S., 577), when it is attempted to apply it to a charge for transportation through an entire series of States, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated.

In the case of Augusta S. R. Co. vs. Wrightsville & T. R. Co., 74 F. R., 522, the Circuit Court, Judges Pardee and Speer, sitting together, passed on this very point of local rates applied to through traffic.

At page 527 the court says:

"Nor does it follow, as insisted for the respondent, that 'the full local rate permitted by the State law is, in the absence of a contract between the roads for through shipment, a just or reasonable rate on freight plainly not local, but through freight. Why is it reasonable that a railroad company should charge a higher rate for local than for through shipments?'

"In King vs. Railroad Co., 4 Interst. Com. Com. R., 262, we find this clear proposition: 'The local rates are made for many trains that run slow, stop generally at every station, delivering and taking on freight, chiefly in parcels not loaded or unloaded by the shippers or consignees, but loaded or unloaded by the servants of the company. They, of course, carry freight occasionally in car-loads to local points. Such shipments are, of course, much more expensive than through freights, and for such services an additional charge is reasonable, and the laws permit it.'

"*But no fair or equitable construction will justify the exaction of local rates for freights not local, where the services belonging to local rates is not offered; * * **" (Italics mine.)

The local rate in this case was \$2.76 per ton, and the court goes on to ask: "Is the rate of \$2.76 a ton on freight in

"itself not local, but through freight, *per se* unreasonable? "As we are now informed we think it is" (74 F. R., 527).

In the recent case of Northern Pac. R'y Co. *vs.* Keyes, 91 F. R., 47, Thayer, circuit judge, and Amidon, district judge, sitting together, the court says, at pages 53 and 54, that local traffic is always more expensive to handle than through traffic: "It costs as much to bill and pass through the records of the company a box of merchandise paying a freight charge of 50 cents as it does to perform the same service for a car load of wheat paying a revenue of \$75. Furthermore, the great volume of traffic is loaded by the shipper and unloaded by the consignee, while local freight has to be stored, loaded, and unloaded by the carrier."

"Many witnesses were called by the plaintiffs to testify in respect to the relation of cost to revenue in the case of local business as compared with the entire business of the companies. By none of them is the expense of conducting transportation placed at less than twice as much in the former case as in the latter. Mr. Erling, the general manager of the Milwaukee road, a person of great experience and apparent candor, stated that the cost of conducting local business on the entire system of that road was at least twice as great as for through business, and that in sparsely settled communities, like North Dakota, where traffic is light, such cost was four or five times as great in the one case as in the other. This was also the testimony of Mr. Fink in the Nebraska case, a witness whom both the circuit and supreme court mention as possessing peculiar qualifications for giving a trustworthy opinion upon such matters."

In this case following the decision of this court in the Nebraska Maximum Rate case (*Smythe vs. Ames*, 169 U. S., 431) the Dakota court enjoined the board of railroad commissioners of North Dakota from subjecting any part of the interstate traffic of the roads of that State to a local *infra*-state tariff.

In the case of *Smythe vs. Ames*, 169 U. S., 466, this court also found that local traffic was more expensive (p. 529).

This decision is conclusive upon the question that it is unreasonable to subject interstate traffic to local rates, and that national and local traffic are wholly and essentially distinct and separate, and that the rates for each must be based upon their own peculiar inherent circumstances without reference at all of the one to the other.

As stated by the Circuit Court for North Dakota, *supra* :

"This is the most important feature of the decision in that important case. The other questions discussed in the opinion had all been passed upon by former decisions of the

"court; but this clear and complete separation between the
 "local and interstate traffic of a carrier conducting both
 "kinds of commerce, though following as a necessary con-
 "clusion from the commerce clause of the Federal Constitu-
 "tion, had not before been expressly declared."

There must be local rates for local business, based solely on that business, and interstate rates for interstate business, and the interstate traffic cannot be subjected to local rates, which if too low are destructive to the carrier, and if too high are injurious to the public.

At pages 540, 541, 542, 169 U. S., this court says:

"It is further said, in behalf of the appellants, that the
 "reasonableness of the rates established by the Nebraska
 "statute is not to be determined by the inquiry whether
 "such rates would leave a reasonable net profit from the
 "local business affected thereby, but that the court should
 "take into consideration, among other things, the whole
 "business of the company, that is, all its business, passenger
 "and freight, interstate and domestic. If it be found upon
 "investigation that the profits derived by a railroad com-
 "pany from its interstate business alone are sufficient to
 "cover operating expenses on its entire line, and also to meet
 "interest, and justify a liberal dividend upon its stock, may
 "the legislature prescribe rates for domestic business that
 "would bring no reward and be less than the services ren-
 "dered are reasonably worth? Or, must the rates for such
 "transportation as begins and ends in the State be estab-
 "lished with reference solely to the amount of business done
 "by the carrier wholly within such State, to the cost of doing
 "such local business, and to the fair value of the property
 "used in conducting it, without taking into consideration
 "the amount and cost of its interstate business, and the value
 "of the property employed in it? If we do not misappre-
 "hend counsel, their argument leads to the conclusion that
 "the State of Nebraska could legally require local freight
 "business to be conducted even at an actual loss, if the
 "company earned on its interstate business enough to give
 "it just compensation in respect of its entire line and all its
 "business, interstate and domestic. We cannot concur in
 "this view. In our judgment, it must be held that the rea-
 "sonableness or unreasonableness of rates prescribed by a
 "State for the transportation of persons and property wholly
 "within its limits must be determined without reference to
 "the interstate business done by the carrier, or to the profits
 "derived from it. The State cannot justify unreasonably
 "low rates for domestic transportation, considered alone,
 "upon the ground that the carrier is earning large profits
 "on its interstate business, over which, so far as rates are

"concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

As said by the court of North Dakota, *supra*, this complete separation of interstate traffic from *infra* state traffic is a necessary conclusion from the commerce clause of the Constitution, and it is the logical result from all the cases that interstate rates and local rates must be separately made and based upon their own peculiar circumstances.

The Nebraska case is the first direct announcement of that fact.

In view of the Nebraska decision it is unnecessary to review the older cases, so we will proceed to discuss other features of the added local.

ADDED LOCAL UNCONSTITUTIONAL.

The testimony of petitioner corroborated by General Manager Ward, a witness for the roads, shows that this freight from Memphis was not carried to Charleston, but was switched off at Summerville (Trans., pp. 51-75).

Thus, 9 cents per hundred was charged and collected for a purely imaginary constructive haul from Charleston to Summerville. It is to be remembered that this was in addition to the through charge of 19 cents per hundred pounds from Memphis to Charleston, thus including a charge for the constructive imaginary haul from Summerville to Charleston. In other words, the charge was made in contemplation of a journey of 22 miles past Summerville to Charleston and then 22 miles back again, thus making an extra and unnecessary journey of 44 miles. The goods were shipped

on a through bill of lading directed to Summerville and not to Charleston (Trans., p. 82). A through bill of lading or a through ticket means a through and direct journey. To carry them beyond would be an "unconstitutional hindrance and obstruction of interstate commerce."

In the case of *The Illinois Central Railroad Company vs. The People of the State of Illinois*, 163 U. S., p. 153, it is said by the court:

"The effect of the statute of Illinois, as construed and applied by the supreme court of the State, is to require a fast mail train, carrying interstate passengers and the United States mail from Chicago, in the State of Illinois, to places south of the Ohio river, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route, and running to a station three miles and a half away from a point on that route, and back again, and thus traveling seven miles which form no part of its course, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, as admitted in this case, the railroad company furnishes other and ample accommodation.

"This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States."

Therefore it is clear that to carry this interstate freight to Charleston and back again to Summerville, an extra journey of 44 miles, when its destination is Summerville, on a through bill of lading made out expressly to that place, would be an "unconstitutional hindrance and obstruction of interstate commerce."

It is obvious that if the haul itself is unconstitutional, any charge for such a constructive haul is unconstitutional.

Increase of a rate may be a burden and obstruction on interstate commerce (*Wabash case*, 118 U. S., 557; *Covington Bridge Co. vs. Kentucky*, 154 U. S., 217).

ADDED LOCAL UNREASONABLE BECAUSE IT CHARGES FOR TWO VOYAGES IN REALITY BUT ONE.

In the *Wabash case* (118 U. S., 571) the Supreme Court, speaking "of a continuous transportation of goods from New York to central Illinois or from the latter to New York," says:

"Whatever may be the instrumentalities by which this

transportation from one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi river."

It is therefore free from "*local rules and local regulations*," * * * "concerning the *price, compensation* or taxation, or any other restrictive regulation" * * * as to "*fares and charges*" and "*rates of transportation*" (118 U.S., 572-577).

"The transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city" (*Henderson vs. Mayor of New York*, 92 U. S., 271).

The carriage of goods from Memphis to Summerville, on a through bill of lading, as one continuous shipment, is one voyage.

The single voyage from Memphis to Summerville is not completed until the goods are disembarked, and no *local* regulation of any description can be imposed before the voyage is completed.

Under the present system there are two separate charges for two separate and distinct voyages, one from Memphis to Charleston on a through interstate rate, and another from Charleston to Summerville on a strictly local rate, participation in which is repudiated by all carriers west of Augusta.

Yet the goods are carried as one through shipment, on a through bill of lading, reading not from Memphis to Charleston, but from Memphis to Summerville (Trans., p. 82).

There should be one charge for one voyage. There must be interstate rates for interstate traffic. We think that if interstate rates were expressly made by the carriers for interstate traffic, it would lessen the undue discrepancies between one interstate point, such as Summerville, and another interstate point, such as Charleston, as to "*the price, compensation*," "*fares and charges*" and "*rates of transportation*" on goods emanating from the same point in another State, such as Memphis, Tenn. Of course, it goes without saying that we do not seek to have the roads carry at unreasonably low rates to any point; but we think beyond question it is only reasonable to require them to make interstate rates to interstate points on a strictly interstate basis when they carry interstate traffic on through bills of lading. That the result of this would be far more reasonable and just than the results of the present system is our firm belief.

As my friend delights to deal in familiar examples and object lessons, we offer the following:

If a tailor cuts a piece of cloth to make a suit for a 6-foot man, it may fit the man. If he cuts the cloth for a 3-foot boy, it may fit the boy. But if he attempts to cut it so as to

make a "combination" suit that will fit at the same time a 6-foot man and a 3-foot boy the result is apt to be unique.

Our contention is only that this "combination rate," produced by a mixture of an interstate or national rate, and an intrastate or local rate, is incongruous, unscientific, grotesque, and unreasonable.

The request that interstate rates be made on an interstate basis is our only request, and a very reasonable one, and it is done in the East, West, the North, and parts of the South, with beneficial results.

ADDED LOCAL EXACTS FOUR TERMINAL CHARGES FOR ONE JOURNEY, THUS BURDENING INTERSTATE COMMERCE TO THE EXTENT OF MILLIONS.

The rate of 9 cents per 100 or \$18 per car-load made for local traffic wholly within the State by the South Carolina railroad commission includes, as a matter of course, two terminal charges.

Mr. A. B. Stickney, in his work on "The Railway Problem," hereinbefore cited, says:

"There are two principal divisions of the expenses of railway transportation: (1) The cost of terminal or station work. (2) The cost of handling. As every shipment requires station-work, at both the forwarding and receiving station, and as these station expenses are the same whether the haul is a few miles or five hundred miles, it follows that the rate per ton per mile must be materially greater for the short haul than for the long haul."

The rate of 19c. per hundred or \$38 per car load from Memphis to Charleston also includes two terminal charges.

Thus the haul in this case, although it is only one voyage or journey, is subjected to four terminal charges, notwithstanding the freight is carried only between one point and another—that is, between two terminals.

Mr. Stickney says:

"From a somewhat exhaustive examination of statistics, the writer concludes that a fair charge for each terminal expense in the standard average rate would be about 60 cents per ton; and as every shipment is subject to two terminal charges, one at the forwarding and one at the receiving station in making such a schedule, \$1.20 per ton to cover these expenses should be the least charge" (The Railway Problem, by A. B. Stickney, p. 191).

It must be remembered that under the practice and according to the terms of the Southern Railway and Steamship agreement (Trans., p., 93, art. 1, sec. 1) all traffic to a point

on any road, such as the one in the case at bar, is treated as a local at that point, even though the goods originated in San Francisco or Alaska, and the local rate is exacted, thus imposing two terminal charges for the interstate haul and two more terminal charges under the local rate, making four terminal charges in all, for one voyage or journey.

The enormous tax or burden upon commerce in this section can well be imagined, for it has been estimated that a reduction of 1 mill per ton per mile throughout the United States would relieve trade from \$100,000,000 per year.

The imposition of two extra terminal charges, amounting to \$1.20 per ton—taking Mr. Stickney's figures as correct—on all the interstate traffic delivered in this section must be prodigious.

In the Nebraska case this court held that a State had no power to add to the burdens of interstate commerce by reducing one-twentieth of the income of interstate roads. It would assuredly hold that the State has no right to add to the burdens of interstate commerce by imposing high local rates to be collected in addition to through rates.

What the sovereign cannot do a lesser person cannot do, and the railroads are not greater than the States.

In the celebrated Debs case, 158 U. S., p. 581, the Supreme Court of the United States says:

"It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of State legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?"

ADDED LOCAL SYSTEM VIOLATES RULE AS TO UNIFORMITY.

In *Leisy vs. Hardin*, 135 U. S., 112, this court says through the chief justice:

"But the transportation of passengers or of merchandise from one State to another is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one State could, directly or indirectly, tax persons or property passing through it, or pro-

"hibit particular property from entrance into the State, "that the power of regulating commerce among the States "was conferred upon the Federal government."

"In the matter of interstate commerce the United States "are but one country, and are and must be subject to one "system of regulation, and not a multitude of systems."

Robbins vs. Shelby Taxing Dist., 120 U. S., 494.

Stoutenburgh vs. Hennick, 129 U. S., 141.

The Brimson Case, 154 U. S., 471.

Bowman vs. Chicago R'y Co., 125 U. S., 480.

Wabash R'y vs. Illinois, 118 U. S., 557.

Covington, &c., Bridge Co. vs. Kentucky, 154 U. S., 217.

In *Gibbons vs. Ogden*, 9 Wheat., 8, Daniel Webster said it would not be waste of time to point out the varied purport and effect of the several State laws as to the use of "steam and fire" in navigating the Hudson, and proceeded to show that in the waters of New York a vessel not having a license to use "steam and fire" would be forfeited. Going from New York or elsewhere to Connecticut, she would be prohibited from entering the waters of the latter State if she have such license, and in New Jersey still another system of regulations were made.

So here we call the attention of this court to these facts set out in the pleadings as aptly illustrating the intolerable uncertainties and differences to which interstate traffic would be subjected if local regulations were permissible. In their answer at page 34 of the Record the roads say:

"15. Respondents aver that the law of the State of Georgia authorizes and requires the railroad commission of that State 'to make reasonable and just rates,' to be observed by all the railroads of that State. Said commission has adopted and published a standard tariff, which is a scale of freight rates to be charged by railroads in Georgia; said scale runs from one to four hundred and sixty miles. Said rates increase with the distance, but not in exact proportion with the distance. If said scale of rates were carried forward to seven hundred and fifty miles (the distance from Memphis to Summerville) a rate on hay of 31 cents per 100 pounds for 750 miles would result, which is 3 cents per hundred pounds more than the rate actually charged from Memphis to Summerville.

"16. Respondents aver that the law of the State of South Carolina authorizes and requires the railroad commission of that State 'to make reasonable and just rates,' to be observed by all of the railroads in that State. Said commission has adopted and published a standard tariff, which is a scale of freight rates to be charged by railroads in South

Carolina. Said scale runs from one to 350 miles. Said rates increase with the distance, but not in exact proportion with the distance. If said scale of rates were carried forward to 750 miles (the distance from Memphis to Summerville), a rate on hay of 35 cents per hundred pounds for 750 miles would result, which is 7 cents per hundred pounds more than the rate actually charged from Memphis to Summerville."

So we have the Georgia system producing a rate of 31 cents and the South Carolina system producing a rate of 35 cents per hundred on the same commodity, carried in the same cars, over the same rails, for the same distance, in the same direction, between the same points, at the same time. The rate produced by the Tennessee system would, perhaps, be still different, and so through all the States.

This is precisely what is forbidden, and precisely the condition of affairs that makes a uniform system of regulations a necessity to prevent the "commercial anarchy and confusion" that would otherwise result, to borrow a phrase of Mr. Justice Matthews in *Dow vs. Beidleman*, 125 U. S., 580.

It goes without saying that appellee does not contend that precisely the same rates should prevail all over the United States. That is not the meaning of the decisions requiring a uniform system, nor would it be the result of a uniform system of rate-making.

A uniform system would give rates reasonable and suitable to the different sections of the country, but would prohibit a variety of rates in the same section as is now the case. The interstate goods delivered in Georgia being subjected to one set of locals, the goods delivered in Tennessee being subjected to another set of locals, the goods delivered in Alabama being subjected to still another, the goods delivered in South Carolina to another, and so through all the States.

Nor is our demand one that interferes with the right of the roads to adjust their own rates. We simply ask that they adjust them on a strictly interstate basis when they carry interstate freight.

The practice in this region differs from that prevailing in the North, the East, and the West, and here certain towns are taken as "basing points" or "trade centers," and these receive the through rate, a local being added to intervening places.

Judge Cooley says:

"The pre-eminence of such trade centers in the territory reached by the petitioner's roads is *peculiar*, and has probably been increased by the concessions in rates which the

"railroads have made to them, while making less concessions, or none at all, to less important stations" (*In re L. & W. R. R. Co.*, 1 I. C. C. Rep., 84. See also *Crews vs. Richmond & Danville R. R.*, 1 I. C. C. Rep., 407; also *In re Tariffs and Classifications, Atlanta & W. P. R. R.*, 3 I. C. C. Rep., 19.)

The commission has said:

" * * * It is unnecessary here to discuss the question of the propriety of the practice which prevailed so extensively in the territory covered by the Southern Railway and Steamship Association of making rates by adding locals to the established rate to 'basing points.'"

"The inherent defect in making these rates is that the railroad companies treat traffic intended to be continuous between interstate points as consisting of two kinds of service, independent of each other, the one to the basing point on a through rate, and the other from the basing point to an intermediate point on a local rate."

ADDED LOCAL SYSTEM VIOLATES AXIOM OF RATE-MAKING.

Diagram E shows the contravention of a well-recognized rule of transportation, not laid down by the act to regulate commerce, but universally acknowledged the world over, that the rate per ton per mile decreases with the distance, while the aggregate charge increases. We merely call attention to this to show one of the effects of this added local system, we think an unscientific as well as unlawful system.

"It is axiomatic that the rate per ton mile rapidly decreases as the length of haul increases" (*Northern Pac. R'y Co. vs. Keyes*, 91 F. R., 56).

(Here follows diagram marked E.)

EFFECT OF ADDED LOCAL INJURIOUS TO BOTH PUBLIC AND ROADS. ABANDONMENT WOULD BENEFIT THE LATTER.

In *I. C. C. vs. E. T., V. & G. R'y Co.*, 85 F. R., p. 113, Judge Severens says:

"The railroads cover the country like a web. Only the unproductive and inaccessible places are isolated from their routes. The places where they meet and cross each other, and thus come in competition, are almost innumerable. They are thickly located in all the commercial parts of the country. If the fact of such com-

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

"petition is allowed to become a dominating factor in
 "fixing the relative charges of transportation to the dif-
 "ferent places along the lines, those communities where
 "there is no competition must be blighted by the disadvan-
 "tage with which they are burdened, and the favored places
 "grow prosperous in the sacrifice of others. Counsel for the
 "respondents, after noting the wider distance between com-
 "petitive points in the southern portion of the country, says:

"It is not unusual for a southern railroad to run for a
 "hundred miles from one competitive point to another,
 "where the intervening territory is very poor and sparsely
 "settled. The distance between such competitive points is
 "so great that it is practicable for railroads to make a greater
 "charge for a shorter than for a longer haul."

"With this as the rule in adjusting rates, it seems certain
 "that the poor places must become poorer and the localities
 "more sparsely settled than ever. At least, this would seem
 "to be the very probable tendency. And although I must
 "express an opinion upon a mere question of policy for the
 "carriers with much diffidence, I am very strongly inclined
 "to the belief that their interests would in the long run be
 "better promoted by adhering more closely to the rules of the
 "statute than was done in the present case or is likely to be
 "done under the practice which their counsel endeavors to
 "justify. And public policy would also be advanced by the
 "opposite course, not only in the encouragement which
 "would thus be given to the distribution of commerce and
 "population, but also in extending that equality of privilege
 "which it is one of the prime objects of legislation to pro-
 "mote."

Expert and leading railroad men and statistics bear Judge
 Severens out. Speaking of a similar practice prevailing in
 the North and West prior to the adoption of the interstate
 commerce act, Mr. Stickney in his *Railway Problem*, pp. 61
 and 62, says:

"These tariffs once established, year by year the rate at
 "competitive points gradually sank lower and lower. These
 "reacted to a certain extent upon non-competitive rates;
 "for, as the difference increased the logic of figures began to
 "assert its influence. By sophistry men might appear to
 "justify a difference, but when the rate for hauling a ton of
 "freight 400 miles was only say one-third of the rate for
 "hauling a ton 200 miles over the same road, it seemed too
 "absurd, and it was usually remedied by lowering the higher
 "rate."

"If it be found impossible, in the light of the present day,
 "to justify these methods either on business principles or
 "on the selfish plea of advantage to the companies, it must

"be admitted that they were strictly in accordance with precedents which had been established by older companies in older communities, and therefore it ought to be conceded that the managers in establishing them might have been unconscious of acting against the best interests of their companies. Indeed, it was not immediately apparent that they were prejudicial to the companies. At that time the amount of business at competitive points, compared with the business at non-competitive points, was relatively less than it is now; therefore since the non-competitive rates were held up, the cutting of competitive rates only slightly affected the aggregate revenues. But when the discriminating tariff continued in force it was found that year by year, more and more business centered at the points of competition. Every new manufacturing establishment, new business ventures of every kind, and consequently population, sought such localities as a matter of course. Statistics show that the entire net increase of population from 1870 to 1890, twenty years, in Illinois, Iowa, Wisconsin, and Minnesota (except the new section which has not yet felt the effects of discrimination) was in cities and towns possessing competitive rates; and further, that all the non-competitive towns and villages decreased in population. Thus it happened, as time passed, that the depleting effect of these methods upon the railway treasuries became more apparent as the population and business of non-competitive territory decreased."

The case at bar shows clearly the effects of this false system. At pages 50, 51, Trans., we find:

"Q. Mr. NORTHROP: What is your business?

"A. Mr. BEHLMER: Wholesale hay and grain.

"Q. Mr. NORTHROP: Do you propose to do a larger business in Summerville?

"A. Mr. BEHLMER: If I get the rates.

"Q. Mr. NORTHROP: In what way?

"A. Mr. BEHLMER: On car-load lots.

"Q. Mr. NORTHROP: And you think of going into manufacturing enterprises there?

"A. Yes, sir.

"Q. Why cannot you do that now?

"A. The rate is too great.

"Cross-examination by Mr. BAXTER:

"Q. Where do you expect to sell the products of the mill you expect to start?

"A. In Summerville and a little higher up.

"Q. You expect to ship it away?

"A. Yes, sir.

"Q. To what points?

"A. To Georgia stations."

So the present rates stifle the enterprise of a flour mill in this town.

In their eighth annual report to Congress for 1894 the commission make special mention of the case at bar, and, amongst other things, say (pp. 19 and 20, Ann. Rep., 1894, I. C. C.):

"The defendants carried hay in car-loads from Memphis, Tenn., through Summerville to Charleston, S. C., for 19 cents a hundred, while they charged the complainant 28 cents a hundred on car-load shipments from Memphis to Summerville, the 9 cents difference being equal to the local rate in force for carrying hay from Charleston back to Summerville. It was evident that this difference of \$1.80 per ton was sufficient to preclude the complainant, engaged in business at Summerville, from buying hay and selling and reshipping it to other points in that section in competition with Charleston dealers. The Charleston competitor could usually afford to sell to the same customer for what the hay cost the complainant. The Summerville dealer was thus practically confined to Summerville for a market, and even there had to compete on even terms with dealers doing business at Charleston, 19 miles away.

* * *

"Correction of methods of rate-making which tend to encourage business monopoly is a leading object of the act; and the commission, by its construction and application of the law, and especially the fourth section, endeavors to accomplish that object. We believe, moreover, that the true interests of the carriers would be materially advanced if they should heartily endeavor to promote this purpose of the statute.

"The policy generally adopted by southern carriers, of fixing rates to so-called competitive stations, and making rates to intermediate or local points by adding local or arbitrary rates to rates in force to such competitive points, an illustration of which is furnished in this Summerville case, generally results in preventing the development of business enterprises at the intermediate or local points, and greatly retards their growth. The carriers assert that they are forced into this policy by the competition of other carriers, and rely for their justification upon this alleged necessity.

"We hold that the competition of carriers cannot justify relative rates which prevent or destroy the natural competition of communities or unduly discriminate between persons;

"that this policy of the southern carriers inflicts these injuries in marked degree, and is therefore unwise and unlawful. In so far as the competition of carriers promotes the welfare of persons and places without undue injury to other persons and places, it should be encouraged; but when such competition plainly operates to destroy or prevent the growth of one town and build up another, it should be justly regulated."

That eminent jurist and text-writer, Judge Cooley, speaking of this "trade center" or "basing point" system, says (*In re L. and N. R. R.*, 1 I. C. C. R., 31): "This condition of affairs tends to perpetuate itself, and the disparity of rates as between competitive and non-competitive towns, the former being trade centers, must have had some influence to increase steadily the disparity in growth and prosperity."

* * *

"One result is that towns recognized by railroad managers as trade centers come to be looked upon as towns with special privileges, and other towns strive for recognition as such, and complain perhaps of injustice when they fail. It was made very clear by the evidence produced in behalf of the railroads that the exceptionally favorable rates which were given to certain localities were in some cases given to build up trade centers, and as they had had that effect and large establishments had been located at such centers, invited by the favoring rates, it was urged that there would be injustice in now compelling the roads to go back to the rule of equality. Of this it may be said, *first*, that as between different localities it is no sound reason for discriminating in favor of one as against another that the purpose is to build up the favored locality as a trade center, and, *second*, if the discrimination has existed and has had its effect, the fact that large establishments have thereby been encouraged is no reason why the injustice should be perpetuated. This statute aims at equality of right and privilege, not less between towns than between individuals, and it will no more sanction preferential rates for the purpose of perpetuating distinctions than of creating them."

Mr. Aldace F. Walker, now high in railroad circles, said: "The result of the system was that rates quite reasonable, and in some cases low, were given to and from basing points, and that goods were thence distributed at high local charges in all directions. For example, the rates from New York or Chicago to Atlanta, plus the rate from Atlanta to local points north, east, south, and west therefrom, were the rates charged from New York or Chicago to the latter points direct; and the latter rates were usually very much in excess of rates to distributing points situated

"at a greater distance over the same line in the same direction. While this method was satisfactory to the centers which it created and maintained, the smaller towns and rural communities protested against a system which worked so obviously to their disadvantage. Since the passage of the act the number of these favored localities has decreased in the Southern States, and upon many of the lines the disparity in rates as between them and intermediate or local stations has been diminished. So far as passenger traffic is concerned the rates are generally, if not universally, upon a mileage basis, except upon a few of the weakest roads they are three cents per mile" (3 I. C. C. R., 24).

It is the fate of all systems founded on a false basis to carry many curious and injurious results in their train, and although we have perhaps already said quite enough on this point, yet, as the circuit court below seemed to lay some stress on the idea, and, in fact, said "such a construction as is now sought would destroy competition, the life of trade," we will cite just one more passage from Judge Cooley (in *Martin vs. Chicago, B. & O. R. R. Co. et al.*, 2 I. C. C., p. 44, 45). He says:

"An obvious embarrassment in attempting to provide for and protect the claim made on behalf of trade centers is that it is impossible that there should be any general agreement as to the towns which can be regarded as such trade centers. Indeed, in the nature of things, it is quite out of the power of any one to point out any test by which we may classify those which are and distinguish them from those which are not. The classification cannot be by size merely, for all trade centers are at some period small, and if the classification is by amount of business it will sometimes be found that a small town is, in some articles, if not in all, doing a much larger jobbing business than another which is considerably greater. It often happens that a small town will have a large business in the manufacture and sale of some one article, and perhaps be as truly a trade center for that article as some other town ten or twenty times as great; but the small town which has begun a general jobbing trade with the hope and prospect of a great growth is not likely to perceive any justice in being kept from the fulfilment of its hopes by competition being precluded through the more advantageous rates which are given to the larger town which it aspires to rival. If equal rates will enable it to compete, its business men are very certain to think themselves wronged if they are not given such rates." (Italics mine.)

In view of this undoubted fact, proved by the evidence in this case and ascertained in many investigations by the

Interstate Commission, may we not say in reference to the position taken by the learned circuit court below, such a construction of the law not only would but actually does destroy competition, the life of trade.

In the case of *The Union Pacific Company vs. Goodridge* (149 U. S., p. 690) the Supreme Court says that the act to regulate commerce was designed "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality," and the court also pertinently refers to the fact that carriers "deriving their franchises from the legislature and depending upon the will of the people for their very existence are bound to deal fairly with the public * * * and to put all their patrons upon an absolute equality."

Mr. Aldace F. Walker, heretofore referred to, in an opinion of the commission prepared by him in the case entitled "*In re Tariffs and Classifications of Atlanta and West Point Railroad et al.*" (3 I. C. C. R., pp. 48, 49), says:

"The chief obstacle in the way of a general compliance with the rule of the fourth section is found in the question of revenue. Carriers in the Southern States employ that argument in every case when conformity to the law is suggested. They say that the railroads must live or there can be no commerce by rail, and they insist that any reduction of rates means loss of revenue, which is against the public interest and the carrier's right, unless the rate in question be unreasonable *per se*. But it is not clear that the application of the general rule of the law would involve permanent loss of revenue. The stimulus given to business at intermediate points will increase traffic largely. That proposition has been so often practically demonstrated that no intelligent observer can reject it. Moreover the adjustment required does not necessarily involve immediate loss of revenue. An advance of a single cent, for example, on the various classes and specials composing the large interstate traffic to and from Atlanta would compensate the carriers for very considerable reductions on the comparatively light interstate traffic which is now carried to local points on the Atlanta combination. * * *

"At present the amount shipped to intermediate points is relatively very small. Giving such points the rates charged at more distant places, if adopted and maintained as a general principle, would necessarily encourage local industry and enterprises. Such encouragement would not be at the expense of the coast points, but would, in its reflex action and by necessary laws, ultimately work in their favor also. It is customary for dealers at Baltimore, Phila-

"delphia, New York, and Boston to supply interior towns in their vicinity by sales to customers there located—deliveries being made by the stoppage of cars en route for the terminals—at the same rates charged in case they are carried through. The adoption of such a system in the Southern States would not break up the business of distributing points; the methods would be somewhat changed, but the combinations of credit and acquaintance would maintain existing business relations. The operation of this system in the Eastern, Northern, and Western States, by way of developing local communities, has wrought benefits to the country at large which are obvious to the most superficial observer."

In *Chicago, &c., Railway Co. vs. Wellman*, 148 U. S., 343, Mr. Justice Brewer, speaking for the court, says:

"May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings?"

ROADS SHOULD BE FREE TO MAKE THEIR OWN RATES, BUT THERE SHOULD BE INTERSTATE RATES FOR INTERSTATE TRAFFIC.

We simply desire that, in accordance with the Nebraska case, there should be interstate rates for interstate traffic.

Our demand does not interfere in the least with the right of the roads to adjust their rates. On the contrary, we wish them to exercise their power more freely. We do not want them to confine this adjustment on interstate traffic to a few points like Augusta and Charleston, but to exercise this power with reference to numberless intervening places besides. They need have no anxiety as to our wishing to curtail their rights, for we are endeavoring to extend them in this particular; and we firmly believe it would be better all round.

Of course we are unprepared to say what figures Summerville would receive on her interstate commerce if the rates were adjusted by the traffic managers of the roads serving her, on a purely interstate basis; but if they are the fair and reasonable men my friend says they are, we have no doubt that as soon as they are convinced that points like Summerville are not local in respect to interstate traffic, but stand on precisely the same footing in this regard as Charleston or Augusta or St. Louis or Chicago, they will then give due weight to all the proper circumstances and conditions to be considered, and while Charleston and Augusta will still have the advantage of more trains, more mails, more

depots, more schedules of arrival and departure—in fact, more facilities of various descriptions—than smaller and less important places, still the rates at Summerville will be better than those she has now. These rates may not be precisely the same as Charleston rates, for various good reasons, which may possibly develop, though they have not been assigned or brought out in this case; but the great and oppressive and hope-killing weight of forever being doomed to be a local point will be removed.

We hardly think we could be more liberal in our views or more modest in our request as to this grievance, that dwarfs and cripples our commerce and stifles and destroys us, and by necessary reaction injures the roads themselves, for the South Carolina road, though the oldest in the United States, instead of passing through thousands of thrifty villages nourished by the wise management and prudent policy of building up the country today in order to be strong and prosperous in the future, has drained and pressed the small places out of existence, crushing them by exactions imposed in a short-sighted and self-destructive effort to reap an immediate fortune, thus killing and cutting off its future sources of income and support.

UNREASONABLENESS OF SUMMERVILLE RATE FROM OTHER STANDPOINTS.

While it follows of necessity that the unjust and unreasonable effects of unlawful methods are themselves proofs of unreasonableness, nevertheless we will now proceed to discuss, on additional grounds, the issue that the rate of 28 cents from Memphis to Summerville is unreasonable.

The first thing that strikes us is that the South Carolina road gets \$18 per car-load for doing absolutely nothing. This charge is collected habitually for a purely constructive or imaginary haul from Charleston to Summerville.

(Pages 51-75, Trans. :)

The cars are switched off at Summerville and never reach Charleston at all.

In *Smythe vs. Ames*, 169 U. S., this court, at page 547, after stating what was reasonable from the railroad standpoint, says:

“On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.”

It will be noted that this court speaks of “services rendered.” It is nowhere suggested that a railroad can make a charge for doing nothing.

An overcharge by a public carrier for a public service is unreasonable, according to all authorities from the most ancient times. How to characterize a charge imposed by a public carrier for no service at all we do not know. Mr. Edmunds in his Social Circle brief used the term "extortion;" but in that case it was merely an overcharge for an actual carriage. It must be remembered also that this \$18 per car-load is in addition to the proportionate amount of the "through rate" received by the South Carolina road for the constructive "through haul" of 22 miles from Summer-ville to Charleston.

Now let us examine the situation as to the actual haul of 115 miles on the South Carolina road from Augusta.

It is admitted in section 29 of the answer (Trans., p. 38) that "the joint through rate from Memphis to Charleston of 19 cents per 100 pounds on hay pays to each of the carriers a small profit over the additional cost incurred by them respectively in its transportation."

This admission is sustained by the proof, for the S. C. & G. R. R. received \$24.40 for carrying the car-load in question, and \$18 of this was the amount of the added local, leaving \$6.40 for the proportionate share of the through haul.

The evidence as to cost appears in the record as follows (p. 79, Trans.):

"Q. Mr. BAXTER: Mr. Jackson, what does he show the cost per ton per mile on car-load freight through Atlanta to Augusta, such as these car-loads were?"

"A. Mr. JACKSON: This statement made by Mr. Marsh, showing earnings of train No. 6, March 21, 22, and 23, actual earnings of the train, shows the cost per ton per mile on car-load of freight is 4.2 mills per ton per mile; the cost of hauling miscellaneous freight is 8.89 mills in less than car-loads. Miscellaneous means less than car-loads in that sense.

"The CHAIRMAN: This Memphis freight that is in dispute would cost about the same?"

"A. Mr. JACKSON: Yes, sir; as I understand your question. You want to know whether it would cost any more or less for Memphis freight than to receive the same freight at Atlanta, Ga.? There would be some increase in cost of transporting if it was received in our depot and loaded in cars at Atlanta. Memphis freight would be carried a little cheaper."

So the cost, then, is 4.2 mills per ton per mile on these car-load lots. There were 10 tons in the car in which Behlmer's hay came (Trans., p. 67).

So if one ton costs 4.2 mills per mile, for 115 miles it would cost .483, and ten tons would cost \$4.83. The profit

on the through rate, then, to S. C. & G. R. R. would be \$6.40 less \$4.83, or \$1.57 net on the car-load. That is "a small (?) profit" of over 32 per cent. net, for, dividing the net profit of \$1.57 by the cost, we have—

$$\begin{array}{r}
 \$4.83) \$1.5700(.32+ \\
 \underline{1449} \\
 1210 \\
 \underline{966} \\
 244
 \end{array}$$

But to this, in addition, we must put on \$18 local charge for the imaginary local haul of 22 miles, and we then have the entire net profit of the S. C. & G. R. R. on this shipment of \$19.57, which is not a bad net profit.

In fact it amounts to a net profit of over four hundred per cent. This may, perhaps, seem incredible, so we give the calculation:

Dividing the net profit by the cost, we have—

$$\begin{array}{r}
 \$4.83) \$19.5700(\$4.054 \\
 \underline{1932} \\
 2500 \\
 \underline{2415} \\
 85
 \end{array}$$

Thus, for every dollar expended in cost four dollars and five cents (\$4.05) returns as net profit. If a man gets back a dollar net on an investment of 1 dollar he makes 100 per cent., so if he gets back 4 for 1 he makes 400 per cent.

If we divide the gross receipts by the cost we have—

$$\begin{array}{r}
 \$4.83) 24.4000(\$5.05 \\
 \underline{2415} \\
 2500 \\
 \underline{2415} \\
 85
 \end{array}$$

That is, over five dollars comes back for every dollar put out, or a return of over 500 per cent. on the investment.

These are facts and not flights of the imagination. We again find ourselves incapable of characterizing this condition of affairs.

It must not be forgotten that these rates are imposed on hay and grain, the great western food products.

The Supreme Court speaks of "corn, the principal product of the country" (Wabash case, 118 U. S., 557), and in another case (*Bowman vs. Chicago*, 125 U. S., 480), says that these products might bear the burden of one local charge, but would be "crushed under the load of many."

At page 684, I. C. C. R., *In re Excessive Rates on Food Products*, we find:

"Wheat is as inexpensive to handle and low in cost of movement as any other grain, and of necessity is a traffic which will bear only the lowest reasonable rates and charges."

"Agricultural products can bear only the lowest possible rate which is reasonable" (*id.*, 65).

This fact also appears in the testimony (Trans., p. 74). Here we have, then, a commodity acknowledged on all sides, even by the roads themselves, as requiring the lowest possible rate bearing a tariff that pays for the through haul 32 per cent. net profit to the S. C. & G. R. R., and, with the local added, over 400 per cent. net profit.

In an able article appearing in the September, 1895, number of the *Forum*, entitled "The Benefits of Hard Times," Edward Atkinson, who is by no means an anarchist, says:

"No prudent manager of any manufacturing corporation or of any business enterprise in which capital has been invested in costly machinery, ever fails to charge to the cost of the annual product a full sum for the necessary depreciation of the plant. How many railway corporations are there which have closed their construction account (except for extensions), and have regularly charged off year by year a sum sufficient to bring the valuation of locomotive engines—which, not many years ago, were rated at over twice what they cost today, cars in proportion; and steel rails which cost \$100.00 a ton—down to the present cash valuation of about seven thousand dollars for the locomotive engine of a more effective kind, better cars at a similar reduction in cost, and steel rails at less than twenty-five dollars a ton? Yet is it not in the interest of the public, and is it not a matter of necessity on the part of the railway corporation, that their plant on which they may expect to earn an income shall be brought down to a valuation representing only what the cost of that railway would be at the present time, on which only can any income now be recovered from the service?"

"Whatever may be the misfortune to the small fraction of the population of this country who have a property interest in railway bonds, or to the yet smaller fraction

" who have any interest in railway stocks, it is nevertheless
 " an economic necessity that all property of this kind must
 " be brought down to a cost valuation at the present time,
 " on which the profit over and above the cost of service may
 " be maintained at 4 or 5 per cent. per annum, as compared
 " to a rightly expected profit twenty years ago of 6 to 10
 " per cent.

" Turning now to the future: The railway service of the
 " country is wholly insufficient for its present need. There
 " may be more than enough through lines, but a very great
 " amount of railway construction is yet required to bring
 " the crossway or connecting service of individual States to
 " anything like a sufficient condition. It is to the great ben-
 " efit of the country as a whole that the speculative method
 " of promoting, and the malefactor's method of plundering
 " the community have been brought to an end. When rail-
 " way construction begins again, as it soon may, will it not
 " of necessity be conducted by men of integrity, on a cash
 " basis with an effort to earn only a reasonable income on a
 " true investment."

This high authority on economics nowhere suggests that
 railroads ought to take over 400 per cent. net profit on
 freight of the lowest grade, or that anything over 4 or 5
 per cent. on the true value of the road would be reason-
 able. He uses rather severe terms as to some of the men
 and methods of the past, but not more severe than the lan-
 guage of many of the courts throughout the country,
 notably the language of Mr. Justice Blatchford in the Erie
 Road case, when Gould had taken the books to Jersey City.
 However, Mr. Atkinson speaks advisedly, for, after stating
 that within the past ten or twenty years, there has been
 little or no difficulty in selecting solvent and properly
 managed roads from the others, he goes on to say :

" If regard be given to the financial history of almost
 " every one of the railway systems which have lately become
 " insolvent, the cause may be readily found, dating in many
 " cases from the very beginning of the enterprise. The
 " ordinary rules which govern sound business undertakings
 " have been wholly disregarded in the lay-out and construc-
 " tion of a very considerable part of the railway service of
 " this country. Had any one at any time in the last twenty
 " years put before investors a manufacturing or commercial
 " undertaking upon the lines on which railway construc-
 " tion has been conducted, not a dollar of true capital would
 " ever have been invested either in the manufacturing
 " operation or the business thus promoted. What would
 " have been thought of the promoter of a textile factory,
 " machine shop, or any other department of productive in-

"dustury, who should have laid before the public a plan for
 "borrowing money sufficient to pay for the plant on first-
 "mortgage bonds, thereby incurring a debt equal to the in-
 "vestment at the very beginning, then issuing as a bonus
 "an equal or lesser amount of second-mortgage bonds, and
 "then throwing in the preferred or common stock for a sum
 "equal to both classes of bonds combined, more or less,
 "without any payment whatever. Would he not have been
 "deemed an imbecile or a rogue? Yet that is not an ex-
 "travagant statement of the way in which many railway
 "enterprises, now almost all in the hands of receivers, have
 "been put upon the public.

"Next has followed an effort to recover from the price of
 "the railway service a full income on both classes of bonds,
 "and something over, for a dividend on the stock. Success
 "has sometimes been temporarily attained even in that
 "undertaking."

This is the secret of much of the trouble, and it is easy to
 understand why the South Carolina road found it necessary
 to charge over 400 per cent. net profit on grain, and no one
 knows what on higher grades of freight, for in the foreclosure
 proceedings which it has just passed through it was found
 to be bonded for over twelve millions and a half. The road
 sold at auction for one million dollars (Trans., p. 123) and
 could be duplicated for two and a half millions. It is there-
 fore no longer under the necessity of struggling to pay in-
 terest on an inflated capital. This is what Mr. Atkinson
 calls one of the great benefits of hard times.

In the Import Rate case (162 U. S., 197) this court held
 that in the matter of rates the "welfare of the communities
 "occupying the localities where goods are delivered is to be
 "considered as well as that of the communities which are
 "in the locality of the place of shipment"—that is, the in-
 terest of the consumers is not to be lost sight of. In the
 Freight Tax cases (15 Wall., 274) it was held that the tax
 would always be added to the cost of transportation and
 eventually fall on the consumers.

Now, this 400 per cent. net profit comes out of the con-
 sumers in Summerville, and it is both to the interest of the
 producer and the consumer that it be modified or scaled
 down to some reasonable amount. The roads west of Au-
 gusta hauled this car-load 635 miles for \$31.60 (Trans., p. 82).

At 4.2 mills per ton per mile, this carriage would cost
 \$26.66 per car-load, leaving a net profit of \$4.94, which is a
 little over 18 per cent. net profit. This is perhaps not un-
 reasonable even on a low-grade freight. At all events, it
 furnishes a strong reason for thinking that the remainder
 of the haul to Summerville ought not to be made for 400

per cent. Here is a haul in the same territory over the same rails of 635 miles at a profit of 18 per cent. and a haul of 115 miles at 400 per cent.

There is still a further and to our minds powerful, if not conclusive, consideration why the present rate and system should be adjudged unreasonable and unjust.

In the food-product inquiry, which we have referred to so frequently, the commission found that "the Southern States "are large consumers of food products shipped from the "surplus producing region by rail, and, when uninfluenced "by water competition, at rates very much higher than rates "paid for like distances to eastern markets.

"Shipments for local consumption and distribution to "intermediate stations in Pennsylvania are largely made at "Philadelphia rates, in Maryland at Baltimore rates, in New "Jersey and New York at New York city rates, and in the "New England States at Boston rates " (4 I. C. C. R., p. 60).

At page 89 of the Transcript is a list of places in the East and in New England taking the rates given the long-distance point, on this traffic; for instance, it will be seen that Trenton, New Jersey, 56 miles west of New York city, takes the same rate as that city. Cumberland, Maryland, 192 miles west of Baltimore, takes the same rate as Baltimore, and so on.

It will also be observed (at page 90, Transcript) that the rate per ton per mile on grain through all this northern territory is between 4 and 5 mills, and in no instance is it anywhere near 2.1 cents per ton per mile, the rate on the South Carolina road.

It will also be observed that the distance to New York from Chicago is 912 miles, and it exceeds that from Memphis to Charleston by 162 miles—that is, more than the entire length of the whole South Carolina road—and yet the rate for this much longer distance is never more than 20 to 25 cents per hundred pounds.

We respectfully submit, then, that 28 cents per hundred for a haul of 750 miles from Memphis to Summerville is unreasonable.

On the question of a reasonable rate—

In *Reagan vs. Trust Co.*, 154 U. S., 412; *R. R. Co. vs. Gill*, 156 U. S., 657; *Smythe vs. Ames*, 169 U. S., 466, this court held that loss of profit is one of the elements to be considered. The propriety of considering loss of profit necessarily means that there is propriety in considering profit. One cannot be done without the other. Even without authority such an element should commend itself as one entering into the problem. It cannot be that loss of profit to the roads should be considered and too great profit excluded. If the

courts will protect the roads from the one they will protect the public from the other. In truth this court has said:

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just to the public. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * So that the right of the public to use the plaintiffs' turnpike upon payment of such tolls as in view of the nature and value of the services rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable" (*Turnpike Co. vs. Sandford*, 164 U. S., 578).

In *U. S. vs. Trans-Missouri Freight Assn.*, 166 U. S., 290, this court said of railways: "That they all primarily owe duties to the public of a higher nature even than that of earning dividends for their shareholders."

In the case of *Canada Southern Railway Co. vs. International Bridge Co.*, 8 App. Cases, 731, Lord Selborne, speaking of a 15 per cent. profit, in giving the opinion of their lordships, says: "They do not say that the case may not be imagined of the results to a company, being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, in reference to the person against whom it is charged."

In *Rickett, Smith & Co. vs. Midland R'y Co.*, p. 271 Law Rep., part IV, April 1, 1896, vol. I, Q. B., Collins, J., says: "Neither do I think a dividend of from 5 to 6 per cent. earned by the respondent so excessive, having regard to the great capital at risk, as of itself to suggest that they are extorting unreasonable sums from their customers."

If a dividend of 5 or 6 per cent. is "excessive," but not to the extent of "extorting," as this language would imply, what would the English courts say of a rate that produced over 400 per cent. net?

When profit is so enormous on a low-grade freight as to be extortionate, it becomes an element just as important as the loss of profit amounting to destruction, which the roads urge as of controlling weight.

We take it that these cases settle the law on this point.

We have seen in the Nebraska case that no more is to be exacted from the public than the services "are reasonably worth." Such is also the tenor of the English cases.

In *Rickett, Smith & Co. vs. Midland R'y Co.*, p. 260 Law Rep., part IV, April 1, 1896, vol. I, Q. B., Collins, J., says:

"Their rights, then, are to be ascertained in the same way as were those of carriers at common law, unfettered by maxima, but who were nevertheless bound to convey at reasonable rates. A main element in such determination must be the expense to the carrier. 'The charge,' says Parke, B., in a case to which a maximum was inapplicable, *Pickford vs. Grand Junction R'y Co.*, 'is no doubt to be varied according to the trouble, expense, and responsibility attending the receipt, carriage, and delivery of the different articles.' The affluence or indigence of the person rendering or receiving the service is beside the question. The reasonableness of the charge must be measured by reference 'to the service rendered and the benefit received.' (*Canada Southern R'y Co. vs. International Bridge Co.*), which is unaffected by the prosperity or misfortune of the parties to the contract."

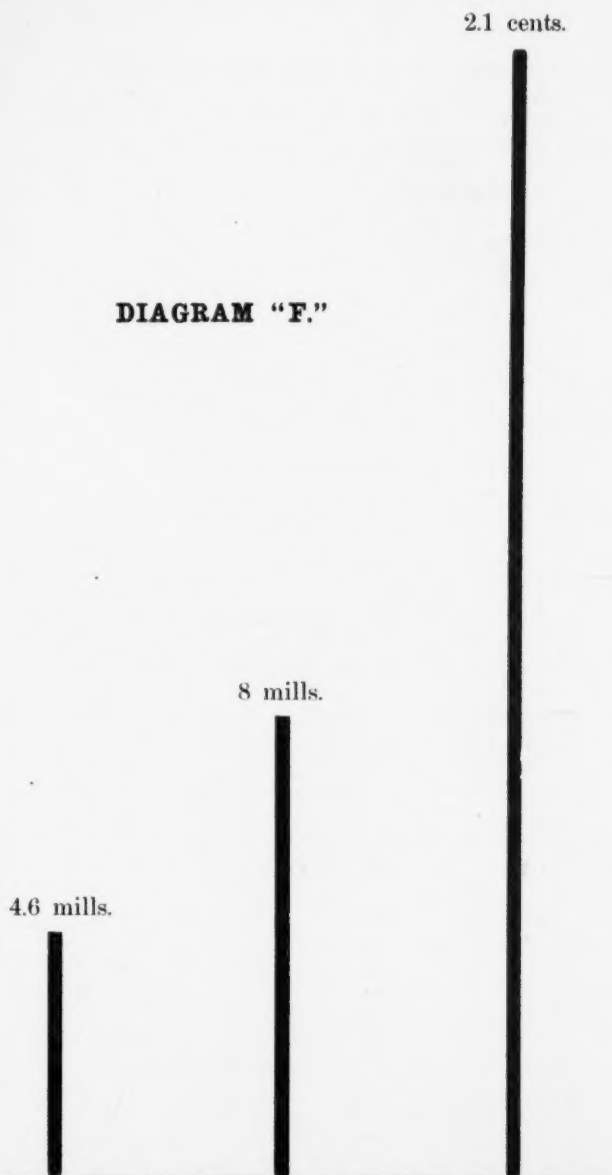
In view of these decisions, we have endeavored to bring out all the elements that would serve to show what the services were "reasonably worth" to the public in the case at bar:

The value of the service to the shipper on a low-grade freight, one of the principal food products of the country; the value of the service to the consignee, who is to be allowed some margin of profit in handling a freight that will only bear the lowest rate; the value of the service to the consumer, whose interests we have asked the court to consider; the expense to the carrier; his trouble in conveying car-loads as contrasted with lots less than car-loads; the just rights of communities to compete as well as for carriers to do so. The element of distance has also been discussed, and in our moderation we have refrained from insisting that it is entitled to as much weight as we think it ought to have according to the decisions and the act making it a circumstance of great prominence. Comparison with rates charged elsewhere and with methods, to our mind, fairer, more scientific, more in accordance with law, and more beneficial in results to communities and to the carriers themselves, has been made. We have also called the court's attention to the enormous profit to the roads as an element worthy of consideration amongst others.

We have endeavored to give every qualifying circumstance due force in discussing the reasonableness of this rate, and we do not hesitate to say that, considering all the defenses set up and all the facts from every point of view, this 400 per cent. net profit on the lowest grade freight, a prime necessity of life, is the ugliest feature in this case, and, in our opinion, surmounts every other consideration on the point of reasonableness. We do not mean to say that there



DIAGRAM "F."



M. to C.

U. S.

S. C. and G. R. R.

RECEIPTS PER TON PER MILE.

are not other ugly features, and we hope they will not be forgotten, but this surpasses all.

It seems utterly inexcusable, especially when we consider the criteria laid down in these English cases—that is, “the trouble, expense, and responsibility attending the receipt, carriage and delivery of the different articles.”

Here is a case of hay and grain in car-loads—articles the easiest and cheapest to handle, as is well known and as the testimony shows; loaded at Memphis by the most inexpensive, convenient, and modern methods; shipped on a through bill of lading without change of cars to their destination, at a place where there are ample facilities for switching off the cars, involving very little delay and the slightest possible trouble in delivery, all of which fully appears in the evidence, and yet, by reason of a purely imaginary constructive haul, a charge is made, giving a net profit of over 400 per cent. Gauged by the English cases, the charge is so unreasonable that we think Lord Selborne would have said it is “preposterous.”

It is respectfully submitted that the evidence sustains the Circuit Court of Appeals in its finding that the rate is unreasonable.

COMPARISON OF RATES CHARGED PER TON PER MILE.

Diagram F shows the rate per ton per mile charged and received by the roads in this case from Memphis to Augusta—that is, 4.6 mills per ton per mile (Trans., p. 67).

The rate per ton per mile from Augusta to Summer-ville—that is, 2.1 cents per ton per mile (Trans., p. 67).

The average rate per ton per mile received by all the railroads in the United States for 1894—that is, 8 mills.

Statistics of Railways. App., diagram 8.

This was for carrying all freight from the highest to the lowest grades in car-loads and less than car-loads, and it is plain that if the figures were given for hauling hay and grain, the lowest grade freight in car-loads, it would be much less.

However, as it is we see that nowhere in the United States was a charge made of 2.1 cents per ton per mile, and that this rate far exceeds the rate charged for hauling the highest and the lowest grade freight. It seems to us utterly inexcusable.

(Here follows diagram marked F.)

COST.

In the Circuit Court of Appeals, in a supplemental brief, counsel for the roads said it was ridiculous to assume as a basis of calculation the "additional cost," as he called it. This makes it necessary to clearly bring out this cost matter.

We said below :

My friend gives us some additional statistics and items outside of the record as to "cost." He tells us what "additional cost" means. Well, we are glad to learn that "additional cost" means less than "actual cost," and that it is ridiculous to use it as a basis of calculation, and we are very glad that we have not done so foolish a thing.

His witness, Mr. Jackson, in giving us the data does not say a word about "additional cost" or any other kind of cost, but speaks of car-load cost without any qualifications (Trans., p. 79), and my friend did not put any question as to "additional cost." He asked the cost of carrying car-loads "such as these car-loads," meaning Behlmer's (Trans., p. 79). All room for doubt is excluded. His witness gives it to us as to car-load freight. We accept it as correct, notwithstanding Mr. Jackson has said it, and as including every proper item, for he has not confined it to "additional cost."

We know that the receipts per ton per mile throughout the United States for 1894 were 8 mills for all freight (Statistics R'ys 1894, App., diagram 8), and that these receipts furnished the funds to pay all the expenses of all the roads, even if they were itemized by the most expert railroad accountant and his items filled volumes. We know that these receipts must have been more than the cost. They aggregated \$820,000,000 in 1894 (Diagram 4, Statistics of Railways 1894, showing "earnings from freight service)." We know that it costs less to carry in car-loads than to carry in smaller quantities. We know that it costs less to carry some freight than it does others (Trans., p. 74). We know that grain is one of the cheapest freights to handle.

We know that Mr. Ward gives us 7.38 mills per ton per mile as the cost of carrying *all classes* of freight (Trans., p. 73).

We know that this includes fruits and vegetables, exceptionally expensive to handle, and lots less than car-loads, also very expensive to handle. We know that it must cost less to carry a low-grade freight, like grain, in car-load quantities than to carry all classes of freight in small and large quantities.

We know that throughout the United States grain is carried at from 4 to 5 mills per ton per mile (Trans., p. 90), and

that it constitutes a large volume of the business of the railroads of the United States, and that they make a good profit on it. We know that a profit is admitted in this case at 4.6 mills per ton per mile (Trans., p. 38).

So we believe that 4.2 mills per ton per mile represents about as near as anything can the cost, including every possible item, of carrying grain in car-loads, and we would not be at all surprised to find that it cost even less. For it must be borne in mind that Mr. Jackson gives us 4.2 mills per ton per mile as the cost of general car-loads. It is evident that it would cost more to carry a car-load of thoroughbred horses than a car-load of grain or coal. So if we had the cost of car-load lots of grain it would very probably be even less than 4.2 mills. This "additional-cost" notion is based principally on the idea that a few stray car-loads of some strange freight, such as a circus, or something of that sort, might be taken over a line to fill out a train already made up. We candidly say we do not take any stock at all in the idea that the South Carolina road conducts three-fourths of its business on an "additional-cost" basis, and yet this is what my friend seems to wish this court to believe. Mr. Ward testifies that three-fourths of the business of this road is made up of this class of freight (Trans., p. 74).

Mr. Stickney scouts this "additional-cost" theory as absurd.

We are not, in this proceeding, at all concerned with a rare case of two car-load shipments in reference to strange and unusual freight. We are dealing with the regular business of the roads, and we think it was quite irrelevant to go into "additional cost" at all. Surely the roads have not presumed to trifle with the court by furnishing ridiculous information. This would be a most impudent confession. They knew the issues, and that we were dealing with three-fourths of their entire freight business, and not with one or two car-loads of, say, Carolina cane-blossoms. The indigenuous cane is said to bloom only once every hundred years. If all these enumerated items entered into the cost, why did they leave them out at the hearing and not mention them until this appeal? We certainly were entitled to an opportunity of examining them.

We believe many items go to make up cost, and we further believe that they are all included in this 4.2 mills per ton per mile for hauling a car-load of freight, ascertained by actual experiment in this section.

It may be ridiculous to accept the figures of any railroad accountant, but we will risk it on this point. We doubt very much if they would have concealed the fact of the cost being greater. If it were greater, we think it is not a very

violent presumption on our part to suppose they would have let us know.

THE PROVINCE OF THE COMMISSION.

In *Smythe vs. Ames*, 169 U. S., this court, on the subject of reasonableness, says at page 527:

"Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people." (See also *Brimson case*, 154 U. S., 474.)

Experience in England demonstrated that it was better to divest the court of common pleas of the jurisdiction originally conferred upon it and impart same to commissioners, the matters proving so intricate.

Lancashire and Yorkshire R'y Co. vs. Greenwood,
Law Reports, 21 Q. B., pp. 217, 218.

It has recently been held in England by the House of Lords that "The jurisdiction to determine whether there is a statutory right to demand from a railway company a facility or a privilege belongs exclusively to the railway commission."

Perth Gen'l Station Comm. vs. Ross, L. R. App. Cases, 479, for 1897.

CIRCUMSTANCES LAID DOWN BY THE COMMISSION AS TO REASONABLE RATE.

Value of service.—*Re Excessive Rates on Food Products*, 4, I. C. C. R., 48.

Cost of service.—The expense to the carrier in the transportation of freight and passengers is a fact to be considered in determining what is a reasonable rate.

Boston Chamber of Commerce vs. L. S. & M. S. R. R., 1 I. C. C. R., 436; *Rice et al. vs. W. N. Y. & P. R. R. Co.*, 2 I. C. C. R., 389; *Business Men's Ass'n vs. C. & N. W. R'y*, 2 I. C. C. R., 73; *Thurber vs. N. Y. Cen. & H. R. R. Co.*, 3 I. C. C. R., 473; *Boston Fruit & Produce Exchg. vs. N. Y. & N. E. R. R. Co.*, 4 I. C. C. R., 664; *N. Y. B'd of T. vs. Penn. R. R. Co.*, 4 I. C. C. R., 447.

Operating expenses.—These are to be considered.

N. O. Cotton Ex. vs. C. N. O. T. Pac. R'y, 2 I. C. C., 375; *Evans vs. Or. R'y & Nav. Co.*, 1 I. C. C. R., 325.

Character of commodity.—The character of the commodity is one of the elements necessary to the determination of what is reasonable.

Imperial Coal Co. vs. P. & L. E. E. R. Co., 2 I. C. C., 618.

Value.—In determining the reasonableness of a rate the market value of the commodity in question is a fact, among other things, to be considered.

Evans vs. Or. R'y & Nav. Co., I. C. C. R., 325; *James et al. vs. T. V. & G. R'y Co.*, 3 I. C. C., 225; *Harvard Co. vs. Penn. Co.*, 4 I. C. C., 212; *Warner vs. N. Y. Cen. & H. R. R. Co.*, 4 I. C. C., 32; *Delaware State Grange vs. N. Y. P. & N. R. R.*, 4 I. C. C., 588; *N. O. Cot. Ex. vs. Ill. Cen. R. R. Co.*, 3 I. C. C., 534; *Beaver et al. vs. P. C. & St. L. R'y Co.*, 4 I. C. C., 773.

Risk.—In determining what is a reasonable rate, the amount of risk incurred by the carrier during the transportation is, among other facts, to be considered.

N. O. Cot. Ex. vs. Ill. Cen. R. R. Co., 3 I. C. C., 534.

Speed and special train service.—The facts that the shipment of a given commodity demands a special train running at a particular hour and on fast time, and that such train must return empty, are all necessary to be considered in determining what, in such case, is a reasonable rate.

Boston Fruit and Produce Ex. vs. N. Y. and N. E. R. R. Co., 4 I. C. C., 664.

Volume of business.—In considering the question of what is a reasonable rate, the volume of business is a fact, among other things, to be considered.

Boston Cham. Commerce vs. L. S. & M. S. R'y Co., 1 I. C. C. R., 436; *Rice et al. vs. W. N. Y. & P. R. R. Co.*, 2 I. C. C. R., 389; *Warner vs. N. Y. Cen. & H. R. R. Co.*, 4 I. C. C., 32.

Population along the line.—In determining what is a reasonable rate, the density of population along the line is a factor.

Bus. Men's Ass'n of Minn. vs. C. & N. W. R'y, 2 I. C. C., 73.

Amount of through and local business.—In determining what is a reasonable rate for a particular commodity, among other facts to be considered is the relative amount of through and local business.

Evans vs. O. R'y & Nav. Co., 1 I. C. C. R., 325.

Empty cars.—Empty cars and want of return loads is also a fact to be considered.

James et al. vs. E. Tenn., Va. & Ga. R'y Co., 3 I. C. C., 225; *Boston Fruit & Produce Exchg. vs. N. Y. Cen. & H. R. R. Co.*, 4 I. C. C., 664; *Delaware State Grange vs. N. Y. P. & N. R. R. Co.*, I. C. C., 588; *In re Tank and Barrel Rates on Oil*, 2 I. C. C., 365.

Competition.—Actual competition of controlling force and as to traffic important in amount is to be considered amongst other circumstances.

In re L. & N. R. R., 1 I. C. C., 31; *King et al. vs. N. Y. H. & H. R. R. R. Co.*, 4 I. C. C., 251; *N. O. Cot. Ex. vs. Ill. Cen. R. R.*, 3 I. C. C., 534; *Lehmann et al. vs. Sou. Pac. R. R.*, 4 I. C. C., 1; *Bates vs. Penn. R. R.*, 3 I. C. C., 435; *Bates vs. Penn. R. R.*, 4 I. C. C., 281; *Bus. Men's Ass'n of Minn. vs. C. St. P., M & O. R'y Co.*, 2 I. C. C., 52; *N. O. Cot. Ex. vs. Ill. Cen. R. R. Co.*, 3 I. C. C., 534; *Rice vs. A. T. & St. F. R. R.*, 4 I. C. C., 228.

Dividends or profit.—The dividends or profit, while not conclusive, is to be considered amongst other things.

In re Food Products, 4 I. C. C., 65.

Storage capacity.—This is one of the elements to be taken into account.

Boston Cham. Com. vs. L. S. & M. S. R'y Co., 11 C. C., 436.

Distance or mileage.—This is also an element.

La Crosse Manu., etc., vs. C. M. & St. P. R'y Co., 1 I. C. C., 629.

Cost of production is a fact to be considered in the determination of what is reasonable.

Imperial Coal Co. vs. P. & L. E. R. R. Co., 2 I. C. C., 618; *In re Food Products*, 4 I. C. C., 48, 116; *Poughkeepsie Iron Co. vs. N. Y. Cen. & H. R. R. Co.*, 4 I. C. C., 195.

Mountains, grades, curves, snowdrifts, floods.—All these are factors that enter into the problem.

Evans vs. Union Pac. R'y et al., decided by commission February 8, 1896, in reference to rates on wheat.

This list could be extended, but it shows conclusively that the commission in dealing with this intricate subject in cases arising all over the country does so in a broad, liberal, and wise way and in full harmony with the de-

cisions of the courts, and its decisions are and have been as frequently in favor of the roads as against them.

The opinions of such a body are entitled to the greatest weight merely on the ground of its vast experience, if for no other reason.

The defendants only had to advance and prove any of these innumerable elements, and they would have been considered and given their proper value.

In the present case all the circumstances set up by the roads have been duly considered. They have been "weighed in the balance and found wanting."

If there are others, would the ingenious counsel have omitted to bring them out? His consummate skill, care, and industry precludes such a supposition.

He relies chiefly on competition, which after all is only one of many elements, and in this case he has failed utterly to establish "competition that affects rates."

COMMISSION FOUND RATE UNREASONABLE.

My friend says the commission failed to find whether or not the rate of 28 cents to Summerville was reasonable or unreasonable.

We think our friend is in error, for by deciding that the present rates violate the statute the commission has thereby held the rate unreasonable. In the language of the Supreme Court:

"The only material thing is to adjudge what is due according to the rule prescribed by the statute. That the Court of Claims has done. In doing so, it has virtually decided the point in issue; for, if the company has charged rates producing a different amount, they are thereby declared not to be fair and reasonable, because, whatever differs from the amount found by the court to answer this description, cannot be supposed to fulfill it" (*U. P. R'y Co. vs. U. S.*, 117 U. S., 359).

THE DISSENTING OPINION.

Judge Morris says there is abundant evidence "to show the great loss which would result to the South Carolina & Georgia railroad (the successor of the South Carolina railroad), if it was required to conform its *local* rates to its share of the through rates" (Trans., p. 136. *Italics mine*).

The learned judge has fallen into the error of supposing that the haul from Memphis to Summerville, through the States of Tennessee, Mississippi, Alabama, Georgia, and South Carolina, is a local haul.

It must not be forgotten that neither the commission nor appellee nor any one else in this case is dealing with the local traffic of any road. We are dealing with interstate traffic only.

This error of Judge Morris is also the chief error that led the learned Circuit Court astray in following Judge Newman in the Social Circle case. This court directly overruled Judge Newman on this point.

In the Social Circle case, p. 398, I. C. R., and 162 U. S., p. 191, Justice Shiras said :

"Upon this part of the case the conclusion of the Circuit Court was that the traffic from Cincinnati to Social Circle, in issue as to the Georgia Railroad Company was *local*, and that that company was not, on the facts presented, made a party to a joint or common arrangement such as make the traffic to Social Circle subject to the control of the Interstate Commerce Commission. We are unable to accept this conclusion." (*Italics mine*).

Furthermore, the calculations made in this case are based upon that erroneous idea, and are, therefore, inapplicable, being directed toward a theory solely. They are also insufficient to prove anything at all, for the only evidence of this possible \$206,584.68 loss to the South Carolina's road is a table (at p. 106, Trans.), where the operating expenses are lumped at \$1,049,535.50.

The language of Mr. Justice Brewer (in *Chicago, &c., Railway Co. vs. Wellman*, 143 U. S., 345) is particularly applicable here.

He says :

"It is agreed that the defendant's operating expenses for 1888 were \$2,404,516.54. Of what do these operating expenses consist? Are they made up partly of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the court, it has not come to this, that the legislative powers rest subservient to the discretion of any railroad corporation which may, by

exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'

"We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

This language is cited with approval in *St. L. & S. F. R. R. vs. Gill*, 156 U. S., pp. 660 and 661.

So we say here the record is silent as to many material facts in regard to this alleged future annual deficit.

Among other things, suppose it should appear that at the time this report was made, June 30, 1892, the road had a bonded debt of over \$12,000,000, and that it was afterwards sold for \$1,000,000 at auction (*Trans*, 123.) At five per cent. this would only make an interest account of \$50,000 annually, and, instead of having to pay interest on funded debt, \$374,434.60, as the report has it (*Rec.*, p. 105), there would be a saving in this item alone of \$324,434.60 annually, which would completely annihilate the imaginary loss of \$206,584.68 and make a handsome surplus, over \$70,000 annually.

In *Dow vs. Beidelman*, 125 U. S., 680, Mr. Justice Gray says:

"But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the company as reorganized or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under foreclosure equalled the original cost of the road, or the amount of outstanding bonded debt."

But it is idle to pursue these imaginary losses, for, as the Supreme Court has said, the evidence is wholly insufficient, and moreover, as we have seen, they are based upon the imaginary notion that an effort is being made to interfere with local rates, which is not at all the case, as no such issues are made.

Besides, as the Supreme Court remarks, all experience shows "that a reduction of rates will increase the amount of the business, and therefore the earnings" (143 U. S., 343).

And further, as the English cases say, "the affluence or indigence" of the parties is beside the subject. (See also *Turnpike Co. vs. Sanford*, 164 U. S., 578.)

HOW RATES ARE MADE.

In the recent case of *Chicago, M. & St. P. R'y Co. vs. Tompkins*, 90 F. R., 368, the circuit court for South Dakota says:
 " * * * Nor in the face of the record, can the complainant claim that it ever adopted a schedule of rates and fares upon its lines within the State of South Dakota which was based upon the value of the services rendered. Mr. Bird, general traffic manager of the complainant, a witness for the complainant, when upon the stand, testified as follows: 'I testified this morning that I had been in the service somewhat over thirty years, and had been engaged in making rates during that time, and I never have yet had an opportunity of making a tariff on a basis of what the service was worth. I have never had the opportunity to determine the rate by the value of the services. The rates are made what they must be.'"

Mr. Stickney says:

"The interstate law recognizes the necessities of the case, but instead of making schedules or appointing commissions to make them, it contented itself with impotently enacting, in general and somewhat ambiguous terms that somebody else should make them, namely, the railway officials, *who unfortunately know no more about it*, and wholly lack the necessary power to enforce the schedules when made" (Railway Problem, p. 142. *Italics mine*).

"They have succeeded in surrounding rate-making with so many apparent difficulties and mysteries that they have completely overwhelmed the judgment of the ablest men" (*id.*, 143).

In witness of the truth of this we see Judge Severens apologizing and expressing an opinion with "diffidence" upon a subject which, as Mr. Stickney, an expert and leading light in railroad circles himself, says, the railroad officials unfortunately know no more about than anybody else.

Mr. Stickney goes on to say, at page 148 of his book:

"A large part of the army of chief and subordinate employes about the general traffic offices are not engaged in making schedules of reasonable public rates, but, on the contrary, in devising means to secretly avoid such rates, so as to 'scoop the business' as against competitive lines, and the conflicting interests which they are adjusting grow out of the unjust discrimination they are practicing. Destroy their power to discriminate and there would be few conflicting interests to adjust, and little other occupation for the traffic department as now organized.

"Who possesses the exact knowledge of such details as

"would be pertinent to the construction of a schedule of rates in conformity to the principles of law? No schedule of that kind has ever been constructed or attempted, and it is probable that the exact knowledge of the details usually current in the general traffic offices of a railway company would not materially aid in the first attempt at making such a schedule."

At page 86 he says:

"The truth is, and it is time the investing public should be told the truth, it is not the so-called 'granger laws,' nor the interstate law, nor the acts of commissions which have reduced the rates of transportation to the present unprofitable level, but the *mismanagement of the companies.*" (*Italics mine.*)

It may be well to say that, as far as the case at bar is concerned, we do not think it necessary to contend that railroads should not make their own rates. That question does not arise here. We only quote eminent and experienced railroad men to show how rates are made.

MATHEMATICS AND RATES.

It is true that Lord Herschell and Mr. Justice Wills in the Phipps case have said that mathematics should play no part in rate-making. Other tribunals have likewise held the same. We might use Mr. Baxter's argument as to Judge Severens on this point, namely, that, while he entertains the deepest respect for his judgment on questions of law, he cannot accept without question his opinions on intricate railway problems. This might be said of all courts; but we are not in this case advocating that rates should be constructed on a purely mathematical basis. Time may show that such is the correct method, and on the other hand it may not. Our present aim is merely to call this court's attention to the subject so that it may not decide the matter definitely one way or the other "without the fullest disclosure of all the material facts," to use the language of Mr. Justice Brewer in *Chicago, &c., R'y Co. vs. Wellman*, 143 U. S., 345, where he also says, "Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public." * * *

Rates have been in other countries constructed on this basis. In his work on "Inland Waterways," heretofore alluded to, Prof. Emory R. Johnson says, at page 79:

"No American engineers have made a detailed calculation for the purpose of comparing how much railroad companies and owners of private canals must charge per ton per mile of freight in order to obtain a fair remuneration

"on invested capital. Work of this kind has been done by the German engineers, Bellingrath and Symphner. They figured out carefully the cost of transportation by large canals and by rail, including every item, maintenance and management of ways, and for maintenance of floating and rolling stock, cost of hauling and profits of ship-owners, but their calculations were confined to German roads and canals, and were made ten years ago."

So we see that it is quite feasible; at all events it has been done.

Mr. Stickney, a practical and highly intelligent railroad man, advocates the idea. At page 64 of his work, *The Railway Problem*, he says:

"In every other business and in every department of the railway business except the traffic department mathematics plays a conspicuous part. The merchant and manufacturer calculate their profits by percentages on the cost price. The engineer, in constructing a railway, recognizes the fact that all curves are comprised of tangents, which bear fixed mathematical relations to each other, which must be observed, and that his gradients must be carefully and mathematically worked out and measured. The superintendent, in making out a time-card for running his trains, recognizes the necessity of mathematical accuracy, for the question as to where and when two trains shall meet cannot be guessed at or left to chance, but in the traffic department it is different. The average traffic officials may truthfully be said to detest mathematics as 'the devil does holy water.' They boldly say that it is impossible to make a tariff of rates based on strict mathematical principles, like a time-card for running trains. This prevailing idea is probably based upon the fact that with their limited mathematical knowledge they are aware of no method of reaching similar results without such infinite labor as staggers the human mind to contemplate, or possibly upon the further fact that, as the business is now conducted, such schedules would evidently be useless."

At page 68 he says:

"The treatment of rates separately and as bearing no mathematical relation to each other, necessarily makes the detail labor of the traffic department so prodigious that it is altogether beyond the physical ability of any one man. In working out the printed rates alone, the mass of figures is so voluminous that no human intellect can grasp them. To illustrate this point, it may be stated that the number of separate printed tariffs in legal effect on a large system at any given time may be approximately estimated at three thousand, some of them containing thirty

" or forty large-size pages of solid columns of closely printed figures. It goes without saying that under such circumstances this work must be left to subordinates and clerks and while they are all issued under the signature of the chief, as a matter of fact he has examined but few of them, and such examination as he is able to make is of a most cursory character. Taking all these facts into consideration and remembering the further practice which has come into vogue of meeting 'not only the cut rates that have been made, but also those that it is thought probable or possible will be made by rival companies,' and of doing this quickly on the spot, it will not be difficult to understand how large a number of persons must be entrusted with the high prerogative of making rates, as well as how the chaotic condition of the tariffs comes about."

In the case at bar we have not gone into mathematics, but have confined our attention to a few figures and facts put forward, not by us, but by the railroads themselves, and consequently they are not to be discarded or discredited out of their mouths at least.

We have used the rate per ton per mile given us by the roads themselves as the cost of carriage, and from that have estimated profit.

In *Smythe vs. Ames* this court took into consideration the *cost per ton per mile*. (See p. 529, 169 U. S.; see also *Northern Pac. R'y Co. vs. Keyes*, 91 F. R., 51.)

This concludes the point of reasonableness. We will now take up discrimination.

UNDUE DISCRIMINATION.

Undue discrimination may be defined as demanding and collecting from the residents of one locality materially higher rates than at the same time are charged the residents of another locality for substantially the same service.

The Circuit Court of Appeals and the commission having both found in the case at bar that the circumstances and conditions are, as a matter of fact, substantially similar, and this finding being amply sustained by the evidence, as we have seen, it necessarily follows that as Summerville is subjected to a charge materially higher than Charleston, it is a locality unduly discriminated against, and that Charleston is unjustly preferred.

**THE ORDER OF THE COMMISSION DOES NOT
FIX RATES; HENCE BY AFFIRMING IT THE
COURT HAS NOT IN EFFECT HELD THAT THIS
POWER RESIDES IN THE COMMISSION.**

We hold that the question of the commission's power to fix rates does not arise in the case at bar, and that the case of the Interstate Commerce Commission, appellant, *vs.* The Cincinnati, New Orleans & Texas Pacific R. R. Co. *et al.* (167 U. S., 479) has no bearing on the case at bar as far as that point is concerned.

By comparing the order of the commission as published in the decision of the Supreme Court in the above-mentioned "Cincinnati case," as it is known, with the order of the commission in the Behlmer case (pp. 23, 24, Trans.), it will be seen that they differ totally. In that case a schedule of rates was prescribed on many classes of freight to many cities, and above all the commission went to the extreme of forbidding any greater charge "than is below specified in cents per hundred pounds," thus fixing absolutely to a cent the rates as set out in the schedule. The above quotation is from the order as published in the opinion of the Supreme Court. (See 167 U. S., 482.)

On the other hand, in the Behlmer case nothing of the sort was attempted. What the rates shall be is left wholly to the roads. They can fix them at any figure they see fit. The charges are not prescribed to a cent by the commission. No figures at all are indicated by the commission. The roads have the utmost freedom to act in determining what the rates shall be.

No tariff has been established by the commission in Behlmer's case, and that is what Mr. Justice Brewer in his opinion declares to be unlawful. He says: "These considerations convince us that under the interstate commerce act the commission has no power to prescribe the tariff of rates which shall control in the future, and therefore cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed." (See page 506, 167 U. S.)

Now, in Behlmer's case, the commission has simply done what the Supreme Court in this very decision says it has a right to do, namely, prohibited a violation of the fourth section of the act.

At the same page, 506, above mentioned, Mr. Justice Brewer goes on to say:

"But has the commission no function to perform in respect to the matter of rates; no power to make any inquiry in respect thereto? Unquestionably it has, and most im-

"portant duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause;" &c.

So in Behlmer's case the roads are left free to prescribe what rates they please, but they are forbidden to violate the long and short haul clause by making a greater charge to Summerville than to Charleston.

This is the express duty of the commission under direct authority of the "Cincinnati case," as decided by the Supreme Court.

The order in the Behlmer case is precisely the same as was the order in the celebrated Social Circle case after it was modified by the Circuit Court of Appeals, and the Supreme Court sustained that portion of the commission's order, and the Social Circle case has not been overruled or modified. It will be remembered that in the Social Circle case the Circuit Court of Appeals for the Fifth Circuit struck out that portion of the commission's order requiring the roads to cease and desist from making any charge for the transportation of such freight as was in question from Cincinnati to Atlanta in excess of \$1 per 100 pounds, but that portion of the commission's order requiring defendants to cease and desist from making any greater charge in the aggregate on buggies, carriages, and other freight of the first class from Cincinnati to Social Circle than they charged on such freight from Cincinnati to Augusta was allowed to stand and was finally affirmed by the Supreme Court. (See 162 U. S., 184.)

THE S. C. AND G. R. R. CO. BOUND BY THESE PROCEEDINGS. SERVICE OF COMMISSION'S ORDER ADMITTED IN THEIR ANSWER.

At pages 128, 129, Trans., and 42 U. S. App., 581, the Circuit Court of Appeals says:

"At the time of the institution of the proceedings before the Interstate Commerce Commission the South Carolina Railway Co. was represented by Daniel H. Chamberlain, its receiver, who was made a defendant, and who filed his answer to the petition. The proceedings were instituted in December, 1892, and the order of the commission issued

" on the 27th day of June, 1894, but prior thereto, on April
 " 12, 1894, the South Carolina Railway Co. was sold by
 " virtue of a decree of the Circuit Court of the United States
 " for the district of South Carolina, entered in the cause of
 " *Bound vs. South Carolina Railway Co. et al.*, in which said
 " cause the said Daniel H. Chamberlain had been appointed
 " such receiver. On the 12th day of May, 1894, the pur-
 " chaser of said property under said foreclosure sale conveyed
 " the same to The South Carolina & Georgia R. R. Co., a
 " defendant herein. That company moved the court below
 " to dismiss these proceedings, so far as it was concerned, for
 " the reason that there was no evidence before the court of
 " any notice to, or service of the same upon said company, of
 " the institution of this action before the Interstate Commerce
 " Commission, nor any evidence of any refusal or neglect by
 " it to obey the order of the commission. The court below
 " was of opinion that there was no evidence of the service of
 " the commission's order on the South Carolina & Georgia
 " Railway Co., nor of its refusal or neglect to obey the same,
 " but as there were other defendants as to whom it was nec-
 " essary to dispose of the questions raised, the court pro-
 " ceeded to a decree concerning the same.

" The petition filed in the court below avers that the
 " findings and conclusions of the commission in the matter
 " of the petition filed before it by the appellant, together
 " with a copy of the order and notice, were delivered to each
 " and all of the parties to the cause, their receivers and suc-
 " cessors in operation. We think the evidence sufficiently
 " sustains these allegations. The South Carolina Railway
 " Co. had due notice of the proceedings before the commis-
 " sion, and filed its answer through its receiver, and it
 " plainly appears that a registered letter was sent from the
 " office of the secretary of the commission in July, 1894,
 " and duly delivered at Charleston to the successor of said
 " South Carolina Railway Co.—the South Carolina & Georgia
 " R. R. Co.—which contained a copy of the opinion and
 " order of the Interstate Commerce Commission made and
 " filed in the matter of said petition. That such copy was
 " received by the South Carolina & Georgia R. R. Co. is not
 " doubted, and the point relied upon by that company in its
 " motion to dismiss made in the court below was that the
 " name of the South Carolina & Georgia R. R. Co. is not
 " mentioned in said order and opinion, and the further fact
 " that said company was organized after the date when such
 " order and opinion were made and filed. In our judgment
 " this position of the South Carolina & Georgia R. R. Co. is
 " without merit. So far as the questions involved in this
 " controversy are concerned, we think it had sufficient notice,

"and in fact that it was bound by the notice served upon
 "and the answer filed by the receiver of the South Carolina
 "Railway Co. The petitioner in his complaint filed with
 "the commission charged the South Carolina Railway Co.
 "and its receiver with unlawfully charging an unreasonable
 "rate of freight on certain articles transported over its line
 "and other lines with which it had traffic arrangements, and
 "the commission, after full investigation, found that the
 "petitioner's allegation was true, and ordered that said road
 "and the others connected with it cease, on or before July 15,
 "1894, to make such unlawful charges. We are utterly un-
 "able to agree with the contention that such order of the
 "commission was rendered absolutely nugatory, within a
 "few days after it was issued, by the mere fact that the
 "name of one of the railroads mentioned therein had in the
 "meantime been changed, while the traffic arrangements
 "theretofore in existence were still in force. To so hold
 "would render it impossible for any petitioner to obtain re-
 "lief in cases similar to this, and would in fact prevent the
 "commission from enforcing its lawful orders. The Su-
 "preme Court of the United States in the case of *United*
 "*States vs. Trans-Missouri Freight Association*, 166 U. S., 290,
 "309, in effect decides this point in the manner we have
 "indicated when it says in substance that if by the mere
 "dissolution of the association originally proceeded against
 "the suit abates, that then defendants have thereby discov-
 "ered an effectual means to prevent the judgment of the
 "court being given on the question really involved in the
 "case.

"We do not think it essential to the decision of this case
 "to further consider the argument of counsel relating to
 "the pecuniary liability of the purchaser or property sold
 "under foreclosure decree, nor of the responsibility of such
 "purchaser for contracts made by the receiver prior to such
 "sale, as, in our judgment, the propositions of law therein
 "involved are not applicable to the facts and circumstances
 "of this case. We conclude that the court below had juris-
 "diction of the parties and of the subject-matter involved,
 "and such being the case, it was its duty as a court of equity
 "to make both its jurisdiction and its remedy effectual for
 "perfect relief, if it found the allegations of the petition to
 "be true."

It would seem hardly necessary to argue this question, in
 view of the foregoing extract from the opinion of the Cir-
 cuit Court of Appeals.

It is to be borne in mind also that one of the assignments
 of error on behalf of Behlmer to the decree of the Circuit
 Court was that said Circuit Court erred in requiring evi-

dence to be put in before it to establish admitted facts, to wit, the service and disobedience of the commission's order (Trans., pp. 115, 116).

By the decree of reversal this assignment of error was sustained.

An examination of the record will show that service of the order is admitted.

Section 8 of the bill alleges:

"That thereafterwards the said commission did, as required by law, cause a properly authenticated copy of its said report of findings of fact and conclusions in said cause, together with a copy of the order and notice aforesaid, to be delivered to each and all of the parties to said cause, their receivers and successors in operation" (Trans., p. 4).

In paragraph 1 of the joint and several answer of the L. & N. R. R. *et al.* it is admitted "that respondent D. H. Chamberlain is now, and for more than six months last past has been, the receiver of the railroad of the said South Carolina Railway Company" (Trans., p. 28).

In the same answer we find the following:

SEC. 8. "Respondents admit that afterwards, the said commission did cause a properly authenticated copy of said report of so called findings of fact and conclusions in said matters, together with a copy of said order and notice, to be delivered to each and all of the parties to the said petition, filed before said commission, their receivers and successors in operation" (Trans., p. 31).

SEC. 9. "Respondents admit that after said report and so-called findings of fact and conclusions of said commission were filed, and its said order was made and entered as aforesaid and on and prior and after the days that said report and said order and notice were delivered to the parties to the petition before the commission, the defendants to said petition, their receivers and their successors, did have, publish, keep in effect, and charge certain rates for the transportation of the kinds and classes of freight mentioned in said report and order, which charges were and are the same complained of in said petition filed before said commission, to wit, 28 cents per hundred pounds on hay from Memphis, Tennessee, to Summerville, South Carolina" (Trans., p. 32).

In the separate answer of the S. C. & G. R. R. Co. we find the following:

SEC. 2. "This respondent denies that it has heretofore been impleaded either by itself or with other common carriers before the Interstate Commerce Commission as alleged in said petition, and this respondent further says that at the time when said original petition was filed by H. W.

"Behlmer before the Interstate Commerce Commission, and
 "at the time the proof was taken thereon, and at the time
 "when the issues made under said petition were heard, this
 "respondent was not in existence, and this respondent sub-
 "mits that the proceedings had upon said original petition
 "and the findings and orders made thereupon by said com-
 "mission do not bind nor affect this respondent in any way
 "whatsoever, it was not before said commission in any way
 "or for any purpose whatever.

"That the railway and property of the South Carolina
 "Railway Company under the order and decree of this
 "court were sold on the 12th day of April, 1894, to Gustav
 "E. Kissel and others, and the sale thereof having been
 "confirmed by this court on the 24th day of April, in said
 "year, a conveyance of the said railway and the property
 "of said company was made to said Gustav E. Kissel and
 "others on the first day of May, in said year, by the special
 "master of this court, and said Kissel and others on the 12th
 "day of May, in said year, conveyed the same to this re-
 "spondent, and this respondent denies that any order and
 "notice from the said Interstate Commerce Commission
 "directing this respondent to do or abstain from doing any-
 "thing whatever has ever been served upon this respondent.

"And this respondent is not bound by any of the proceed-
 "ings referred to in the petition herein as having taken
 "place before said Interstate Commerce Commission.

"3. This respondent, although it is advised that it is not
 "bound to make further answer to the petition in this cause,
 "yet further submits that it is informed and believes that
 "the joint and several answer filed by its codefendant, The
 "Louisville & Nashville Railroad Company, and others,
 "truly and correctly states the facts relating to the proceed-
 "ings had upon said original petition filed by the said peti-
 "tioner before said Interstate Commerce Commission, and
 "also the facts relating and pertaining to the matters and
 "things alleged and averred in said original petition, and
 "therefore this respondent, if required to make further an-
 "swer to the statements contained in the present petition,
 "relies upon the facts and statements contained in the afore-
 "said answer of its said co-respondent as fully as if the same
 "were repeated and set out herein" (Trans., p. 44).

1. It will be observed that the bill alleges that a copy of
 the order, report, and findings of the commission in the
 Behlmer case was delivered to the "parties to said cause,
 "their receivers and *successors in operation*."

The joint and several answer adopted and relied on by
 the S. C. & G. R. R. "as fully as if the same were repeated
 "and set out herein" admits that "the said commission did

"cause a properly authenticated copy of its report of so-called findings of fact and conclusions in said matters, together with a copy of said order and notice, to be delivered to each and all of the parties to said petition filed before said commission, their receivers and successors in operation."

This is surely an admission on the part of the S. C. & G. R. R. Co. that it got the order.

2. But aside from this, service is admitted, for the allegation of the bill, being distinct and definite as to the delivery of this particular order, the evasive phraseology of the separate answer denying "that any order or notice from the said Interstate Commerce Commission directing this respondent to do or abstain from doing anything whatever has ever been served upon this respondent," is a clear admission that the order was received by this road. It does not deny that some order was served nor that the particular order mentioned was served. It merely denies evasively "that any order and notice from said Interstate Commerce Commission directing this respondent," &c., was received, the point being that because the order mentioned the receiver by name and did not mention his successor, the South Carolina and Georgia railroad, by name they got no order directing them to do anything.

This, however, is an admission of the particular allegation of the bill. Where the defendant "answers evasively, the allegations will be taken as admitted."

3 *Greenleaf on Ev.*, § 276.

Jones vs. Person, 2 *Hawks*, 269.

Salla vs. Duncan, 7 *Monroe*, 382.

McC Campbell vs. Gill, 4 *J. J. Marsh*, 871.

3. There is also evidence that the receiver turned over to the S. C. & G. R. R. "all claims against the receiver and all obligations incurred by him," and that these were "assumed" by said S. C. & G. R. R. (Trans., p. 123).

There is no dispute that the receiver got the order, and as by it he "incurred an obligation" he must have turned the order over, as is stated.

It is unquestionable, then, that the Circuit Court of Appeals is correct in finding that "the evidence sufficiently sustains these allegations" of delivery of the order.

The only real question was as to the binding force of the order as a matter of law. The Circuit Court of Appeals has followed the decision of this court in the Trans-Missouri case on that point, and it is settled.

The same question was passed upon and all the cases re-

viewed in *I. C. C. vs. W. N. Y. & Penn. R. R.*, 82 F. R., 192. The court there said :

"The question is, are these succeeding companies to be regarded as strangers to the order? We cannot think so. It would indeed be lamentable if a lawful order against unjust discrimination by a railroad company, made by the Interstate Commerce Commission after a protracted investigation, could be nullified by the subsequent reorganization of the company, or transfer of its railroad and franchises to another corporation. It is a settled principle that the purchaser of property in litigation, *pendente lite*, is bound by the judgment or decree in the suit (1 Story, Eq. Jur., § 405). And the rule is said to be founded upon great public policy, for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end to litigation (*id.*, § 406). This principle is applicable here. This case is very different from those of *Sullivan vs. Railroad Co.*, 94 U. S., 806, and *Hoard vs. Railway Co.*, 123 U. S., 222, wherein it was attempted to enforce against a succeeding owner a contractual liability which did not run with the property, but simply bound the former owner personally. Here the new railroad companies have succeeded to the enjoyment of public franchises, and they have voluntarily taken upon themselves the performance of reciprocal public duties. This proceeding is for the enforcement of a public duty which is inseparable from the ownership of the railroad. No injustice is done to these new companies by joining them as defendants here, for they are entitled to be heard against the enforcement of the order of the commission, and the court is to proceed and determine 'in such manner as to do justice in 'the premises.'"

A purchaser *pendente lite* is as conclusively bound by the results of the litigation as if he had from the outset been a party thereto.

Tilton vs. Colfield, 93 U. S., 106.

Mellen vs. Moline Iron Works, 130 U. S., 371.

As said by Sir William Grant in *Bishop of Winchester vs. Paine*, 11 Ves., 194, 197: "The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise such suits would be indeterminable, or which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined."

The decree of sale expressly made it a condition and a part of the consideration that the purchaser, "he or they, or their assigns, will pay, *satisfy*, and *discharge*," * * * "all ob-

"ligations contracted and *all obligations incurred* by the receiver," and further gives the right to enter appearance in court and contest "any claim or demand which may be presented at any time" (Trans., p. 121).

Appellant contends that the terms of the decree refer only to pecuniary obligations, and do not extend to other obligations of the receiver, as appellee insists. Even under this narrow construction they are bound, for the nature of the present demand is pecuniary—it means a saving of \$18 per car-load to appellee. In *U. S. vs. Miss. Pac. R. R.*, 65 F. R., 906, the court says:

"The bill further sets out, in detail, that about 100 per cent. greater rates are charged to Wichita than to Omaha on the same kind and classification of freights, and this while the shipments are made, as alleged, contemporaneously under similar circumstances and conditions. It is further alleged that such rates are unreasonable, excessive and exorbitant. * * *

"The abuse charged in the bill affects the public, and is *pecuniary* in its nature."

Appellants say a *lis pendens* only binds an interest.

What interest passed under the decree? The franchises were sold.

"The franchises of a corporation are the rights or privileges, which are essential to the operation of the corporation, and, without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for its road, or water for its engines, and the like."

C. & O. R'y vs. Miller, 114 U. S., 186, citing *Morgan vs. La.*, 93 U. S., 217.

So, meeting my friend on his own ground, the doctrine of *lis pendens* binds the interest to take tolls that passed by the sale.

In the case of *Hoard vs. C. & O. R'y Co.*, 123 U. S., p. 226, relied on by appellant, a clear distinction is drawn between *payment* of debts and *performance of obligations*, and, in this respect, is an authority for us. It was a suit for specific performance, and the court dismissed the bill because "the present defendant, the railway company, is not shown to be under any obligation to perform the covenant of its predecessor, the railroad company, which is set up here as a matter of specific performance" (123 U. S., 226).

If they had purchased under a decree such as in the case at bar, expressly making it a condition and a part of the consideration of purchase that the purchaser, "he or they, or their assigns, will *pay, satisfy and discharge*" * * *

"all obligations contracted and *all obligations incurred* by the receiver," the result would have been different and the bill unquestionably retained.

Appellant's other case, *R. R. Co. vs. Miller*, 114 U. S., 176, merely decides a well-settled doctrine that an exemption from taxation is a personal privilege that does not go to a new corporation taking the property of a predecessor unless there is some express provision of law transmitting the privilege. There are later cases decided by the Supreme Court, in fact, one very recently, announcing this well-established doctrine.

We fail to perceive the applicability of this case. We are not asserting that the S. C. & G. R. R. is exempt from taxes.

Even after the receiver has been discharged an action may be maintained against a railroad for injuries sustained during the receivership (*Tex. & Pac. R. R. vs. Johnson*, 151 U. S., 81).

Lastly, this may be regarded as a bill to restrain an unreasonable rate, and appellant is certainly before the court, having been duly subpoenaed.

Reagan vs. Trust Co., 154 U. S., 362.

R. R. Co. vs. Gill, 156 U. S., 649.

Smythe vs. Ames, 169 U. S., 466.

U. S. vs. Miss. Pac. R. R. Co., 65 F. R., 906.

THE CONSTITUTIONALITY OF THE COMMERCE ACT AS TO FEES.

Appellants seek to have the commerce act declared unconstitutional. This is an "enterprise of great pith and moment," which we venture to suggest proceeds upon a misconception of the case of *Gulf, Colorado & Santa Fé R'y vs. Ellis*, 165 U. S., 150. That case distinctly upholds the imposition of an attorney's fee or double damages, &c., as a penalty for the infraction of a duty imposed by a statute passed in valid exercise of the police power.

In pronouncing the opinion of the court, Mr. Justice Brewer, at pages 157, 158, 165 U. S., says:

"That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of

“the peculiar business in which they are engaged—is
 “a just classification, and not one within the prohibition of
 “the fourteenth amendment. Thus it is frequently required
 “that they fence their tracks, and as a penalty for a failure
 “to fence double damages in the case of loss are inflicted
 “(*Missouri Pacific Railway vs. Humes*, 115 U. S., 512). But
 “this and all kindred cases proceed upon the theory of a
 “special duty resting upon railroad corporations by reason
 “of the business in which they are engaged—a duty not
 “resting upon others; a duty which can be enforced by the
 “legislature in any proper manner; and whether it enforces
 “it by penalties in the way of fines coming to the State, or
 “by double damages to a party injured, is immaterial. It
 “is all done in the exercise of the police power of the State
 “and with a view to enforce just and reasonable police
 “regulations.”

In reviewing the cases Mr. Justice Brewer, at page 163, says:

“It is worthy of note that in the same volume is found a
 “decision by the same court, sustaining a statute allowing
 “an attorney’s fee in actions for the recovery of overcharges
 “by railroads (*Dow vs. Beidelman*, 49 Arkansas, 455); but
 “the statute had prescribed the rates of charge for the car-
 “riage of passengers by railroads, had forbidden an over-
 “charge, and it was a penalty for failure to comply with
 “such police regulations that the allowance of an attorney’s
 “fee was sustained.”

It is clearly laid down then by this court that a penalty may be imposed “with a view to enforce just and reasonable police regulations,” under which head comes a law regulating rates, and this court cites with approval the Arkansas case sustaining a fee as a penalty, and distinguishes it in principle from obnoxious cases, such as the one then before the court where “the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to *comply with any proper police regulations*, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State” (165 U. S., p. 159. *Italics mine*).

This case of *Dow vs. Beidelman*, 49 Ark., 455, thus cited with approval by the court in 165 U. S., 163, was directly passed on by this court on an appeal from the supreme court of Arkansas, and the judgment of that court was affirmed. (See *Dow vs. Beidelman*, 125 U. S., 680.)

At pages 684, 685, 125 U. S., we find :

"The defendants asked the court (an inferior court of Arkansas) to make the following declaration of law :

"First. The act of the General Assembly of the State of Arkansas, approved April 4, 1887, in so far as it relates to the present proceeding, is unconstitutional, null and void, because, under the guise of regulating charges for the carriage of passengers on railroads, it amounts virtually to the confiscation of the property of the railroads in the hands of said defendants, and is an unreasonable, unjust, and oppressive taking of private property for public uses without compensation in violation of the constitution of the State of Arkansas and that of the United States.

"Second. The said act of the General Assembly is unconstitutional, because it is special legislation and makes arbitrary discriminations between the different railroads, not based upon their value, their earnings, or other valid grounds, but based simply on the respective lengths of the several railroads.

"The court refused to make either of these declarations of law, and gave judgment for the plaintiff for a penalty of fifty dollars and a *counsel fee of twenty-five dollars*. The defendants excepted to the refusal, and appealed to the supreme court of the State which affirmed the judgment.

"The defendants sued out this writ of error, and assigned for error that the court erred in holding that the statute of Arkansas of April 4, 1887, was not repugnant to the clause of the fourteenth amendment to the Constitution of the United States which provides that no State shall deprive any person of life, liberty or property, without due process of law ; and in holding that that statute was not repugnant to the clause of the amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws." (*Italics mine.*)

It is thus clear that this very question was raised, and this court passed upon it and affirmed the judgment of the supreme court of Arkansas.

It was held in *Dow vs. Beidelman*, 125 U. S., 686, that the legislature in the exercise of its police power had the right to regulate fares and freights and to classify the railroads according "to the amount of business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature" (125 U. S., 691). In announcing the opinion of the court, Mr. Justice Gray based

the decision on the following cases: *Munn vs. Illinois*, 94 U. S., 113; *Chicago, Burlington & Quincy R. R. vs. Iowa*, 94 U. S., 155; *Peik vs. Chicago & Northwestern R'y*, 94 U. S., 164, 178; *Chicago, Milwaukee & St. Paul R. R. vs. Ackley*, 94 U. S., 179; *Winona & St. Peter R. R. vs. Blake*, 94 U. S., 180; *Stone vs. Wisconsin*, 94 U. S., 181; *Ruggles vs. Illinois*, 108 U. S., 526; *Illinois Central R. R. vs. Illinois*, 108 U. S., 541; *Stone vs. Farmers' Loan & Trust Co.*, 116 U. S., 307; *Stone vs. Illinois Central Railroad*, 116 U. S., 347; *Stone vs. N. O. & Northeastern R. R.*, 116 U. S., 352; *Wabash & St. Louis & P. R'y vs. Illinois*, 118 U. S., 557; *Memphis & Little Rock R. R. vs. R. R. Comm.*, 112 U. S., 609.

In this case of *Dow vs. Beidelman*, 49 Ark., 455, the Supreme Court of Arkansas said :

Syllabus : "The act of April 4, 1887, to regulate the rates of charges for the carriage of passengers by railroads, provides that for an overcharge beyond the maximum fixed by the act, the company or person operating the road, shall forfeit and pay not less than \$50 nor more than \$300 and costs of suit, including a reasonable attorney's fee. Held, That the attorney's fee is a part of the penalty for the willful violation of the provisions of the act, and stands upon the same footing as the money judgment to be recovered, and including it as part of the penalty does not make the act obnoxious to the objection of being partial and unequal legislation."

After stating the act, as above set forth, the court adds :

"The attorney's fee is a part of the penalty imposed for the willful violation of the provisions of the act, and stands upon the same footing as the money judgment to be recovered. We have sustained the constitutionality of legislation awarding double damages against a railway company for failure to give the prescribed notice of the killing or injury of live stock by its train" (*L. R. & Ft. S. R'y Co. vs. Payne*, 33 Ark., 816).

"So in other States railroad corporations have been required by statute to fence their tracks and in case of failure so to do, have been made liable for the damages, and in some instances in double the amount of damages, caused thereby and done by their cars and engines to cattle and other animals on their roads. And such laws have been held to fall within the police power of the State. Here the damages are given by way of punishment to the company for its negligence in failing to build the fence" (*Thorpe vs. R. & B. R. Co.*, 27 Vt., 140; *Mo. Pac. R'y Co. vs. Humes*, 115 U. S., 512; *Johnson vs. Chicago & R. Co.*, 29 Minn., 425).

"An attorney's fee may be included as a part of the penalty

"imposed for non-compliance with the duty imposed without rendering the statute obnoxious to the objection of being partial and unequal legislation (P. D. & E. R'y Co. vs. Duggan, 109 Ill., 537; K. P. R'y Co. vs. Yanz, 16 Kans., 583; Mo. Pac. R'y Co. vs. Abney, 30 *Id.*, 41).

"We have examined the cases of S. & N. R. Co. vs. Morris, 65 Ala., 199, and Chicago R. Co. vs. Moss, 60 Miss., 646, but find the principles therein decided to have no application to a case like this."

This decision, as we have seen, was affirmed by this court in *Dow vs. Bedelman*, 125 U. S., 680, and is conclusive.

In the recent case of *Orient Insurance Co. vs. Dagg*, 172 U. S., 557, decided at this term, a Missouri statute putting fire insurance companies in a special class was affirmed, this court saying through Mr. Justice McKenna:

"It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in *Magoun vs. Illinois Trust and Savings Bank* (170 U. S., 283). We said in that case that 'the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion,' and this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary. We see many differences between fire insurance and other insurance, both to the insurer and the insured; differences in the elements insured against and the possible relation of the parties to them, producing consequences which may justify if not demand different legislative treatment. Of course it is not for us to debate the policy of any particular treatment, and the freedom of discretion which we have said the State has is exhibited by analogous if not exact examples to the Missouri statute in *Railway Company vs. Mackey* (127 U. S., 204) and in *Minneapolis Railway vs. Beck* (129 U. S., 26).

"In *Railway Company vs. Mackey* (127 U. S., 204) a law of Kansas was passed which abrogated as to railroads the rule of the common law exempting masters from liability to one servant for the negligence of another. It was sustained as a valid classification, notwithstanding that it did not apply to other carriers, or even to other corporations using steam. The law was objected to, as the statute of Missouri is objected to, on the ground that it violated the

"provisions of the constitution which we are now considering.

"To the first contention the court, by Mr. Justice Field, said: 'The plain answer to this contention is that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State.' And, after further comment added: 'That its passage was within the competency of the legislature, we have no doubt.' To the second contention it was said: 'It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be farther from the fact.' The legislation was justified by the character of the business of railroad companies, and it was declared to be a matter of legislative discretion whether the same liability should or should not be applied to other carriers, or to persons and corporations using steam in manufactures.

"In *Minneapolis Railway Company vs. Beckwith*, (129 U. S., 26), a law of Iowa making a class of railroad corporations for special legislation was sustained."

We respectfully submit, therefore, that it is settled:

(1.) That the legislature may classify railroads and pass special laws to govern them.

(2.) That the regulation of fares and freights is a valid exercise of the police power.

(3.) That such regulations may be enforced by the imposition of "penalties in the way of fines coming to the State, or by double damages to a party injured" (165 U. S., 158).

(4.) That an attorney's fee may be included in the penalty, for, as Mr. Justice Brewer says, approving the Arkansas case, "it was as a penalty for failure to comply with *such police regulations* that the allowance of an attorney's fee was sustained" (165 U. S., 163).

In view of all this the commerce act is not void on account of improper classification. It is a statute regulating fares and freights on interstate commerce, and is thus within the constitutional powers of Congress. It prescribes that rates shall be reasonable; that no charge shall be made for a longer than a shorter haul; that schedules of rates shall be published; it prohibits undue discrimination and so on.

For carrying out its provisions certain penalties are pre-

scribed, and this court has upheld their enforcement in some cases (*Wight vs. U. S.*, 167 U. S., 512).

This court has also held that certain provisions of the act were penal in their nature, and that the right given a shipper to recover the excess of a payment over and above the rates charged to shippers of similar goods to the same destination was penal in its nature (*Parsons vs. Chicago & Northwestern R'y Co.*, 167 U. S., 447).

When we examine the act, therefore, we find this provision for an attorney's fee in section 16 thereof (25 Stat. at Large, p. 855), and it is surrounded by clauses providing that in case the carriers shall disobey the courts, after they are commanded to conform to the law, the court may order them or any of them "to pay such sum of money not exceeding for each carrier or person in default the sum of \$500 for every day," &c. These are highly penal provisions, and, under the maxim *noscitur a sociis*, it is clear that an attorney's fee is also of this character.

It is only necessary to glance at this portion of section 16 to perceive that the provision for an attorney's fee is to be included as a part of the penalty for disobeying the law, and is therefore valid under the decisions hereinbefore cited. The act reads:

"And in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such courts to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise, and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the treasury, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if

" the same had been recovered by a final decree *in personam*
" in such court.

" When the subject in dispute shall be of the value of two
" thousand dollars or more, either party to such proceeding
" before said court may appeal to the Supreme Court of the
" United States, under the same regulations now provided
" by law in respect of security for such appeal; but such
" appeal shall not operate to stay or supersede the order of
" the court or the execution of any writ or process thereon,
" and such court may, in every such matter, order the pay-
" ment of such costs and counsel fees as shall be deemed
" reasonable " (25 Stat. at Large, p. 855).

Respectfully submitted.

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.

SUPPLEMENT.

Appellee entertained the hope that appellants would adhere to the record in this court, but the hope seems vain.

It therefore becomes necessary, as it was before the Circuit Court of Appeals, to take up many matters not raised in the pleadings, not mentioned in the proof, not touched upon in the trial court, and not specified in the assignments of error before this court.

The Hay-Producing Territories and Census Figures.

1. These figures at pages 18 and 19 of my friend's brief only relate to hay. This case concerns hay and grain. An adroit attempt is made to diminish and keep out of sight the grain portion of this controversy. As we said before the commission, we only used a car-load of hay as an illustration of the rates on class D, including hay and grain.

All our testimony was directed to grain as well as hay, and we regard grain as equally, if not more, important than hay, as we wish to manufacture flour (Trans., p. 51).

My friend's figures, therefore, even if correct, relate only to competition of market with market in hay, and we would be entitled to a decree as to grain if no competition is proved in reference to grain, that "affects rates" on grain.

In the Reagan case the Supreme Court used this language in reference to certain statistics from the commissioner of agriculture of Texas (154 U. S., 408-409):

"None of the matters mentioned in the foregoing paragraph appear in the pleadings, or elsewhere in the record, and it is, therefore, doubtful to what extent they may be taken into consideration. * * * While undoubtedly there has been lately a period of financial depression, can we take judicial notice of the extent to which that depression has reduced the prices of the products of the State; and is the report of the commissioner of agriculture of the State to be considered as evidence before us, and accepted as substantially correct, both as to product and prices?"

We ask here, will this court take judicial notice of the census figures, and will they take judicial notice of the fact—if it be a fact—that all the hay raised in the Eastern States is consumed there, and that those States find it necessary to

draw on the West—from the Chicago territory—for an additional supply? Or will this court take judicial notice of the fact—if it be a fact—that the Eastern States raise a surplus supply of hay, and that this territory competes with the Chicago territory and the Memphis territory to furnish the needs of the South, the great consuming market for all these producing regions?

If the latter hypothesis be a fact, then, indeed, the South is very important—the great mine of wealth that supports the rest of the country. However, we think the other might turn out to be true, and on investigation it would be found that the East consumes all it raises and draws on the West for more; but none of this is in evidence, except the fact that the hay and grain which comes to Charleston is grown in the West, even that which comes via New York (Trans., p. 63).

Omission of New England, or Group I.

We have mentioned that Group I, or the New England States, has its food products from the West distributed at Boston rates (Trans., pp. 88 and 89). The able and ingenious counsel for defendants has omitted to compare Group I with Groups II and III, at pages 35 to 40 of his brief.

We now do this in Diagram "G."

It will be observed that Group I has just about the same appearance as Groups IV and V when compared with Groups II and III.

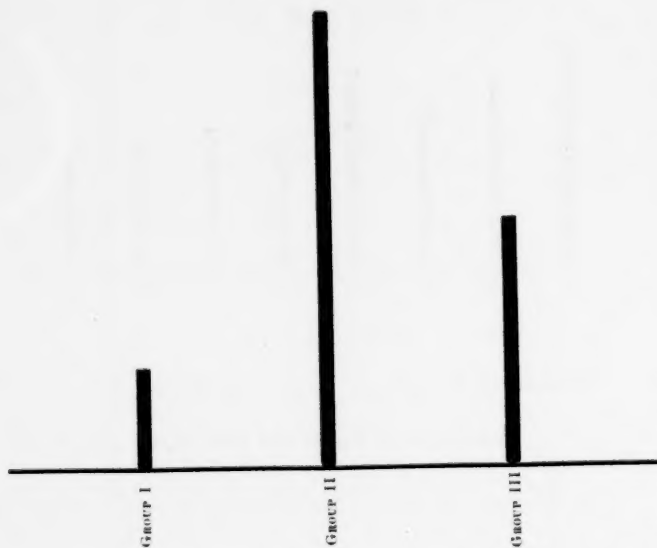
The territory between Chicago and New York comprises Groups II and III, and the New England States Group I.

Statistics of Railways (1894), frontispiece.

The statistician to the commission has published a number of diagrams to illustrate certain comparisons between the railroads in the various groups.

The following diagram (G) illustrates the difference between the railroads in Groups I, II, and III in their "earnings from freight service" during the year 1894.

Statistics of Railways (1894), App. Diagram No. 4.

DIAGRAM "G."**"Earnings from Freight Service."**

The following diagram (H) illustrates the difference in "Density of freight traffic" between Group I, omitted by my friend, and all the other railroads in the United States, excepting Groups II and III.

Statistics of Railways (1894), App. Diagram No. 7.

It will be seen that our groups compare very favorably with the omitted groups.

DIAGRAM "H."



DENSITY OF FREIGHT TRAFFIC, 1894.

Statistics of Railways (1894), App. Diagram No. 7.

Capital and Earnings Compared.

While Groups II and III do a larger business, it must be remembered that their expenses are greater and they have to pay dividends on a greater capital.

Diagram "I" shows the comparison in the capital of Groups II, III, and IV.

Diagram "J," page —, shows the earnings as compared with the capital of Groups IV and V, and the earnings as compared with the capital of all the railroads in the United States.

It will be observed that our groups compare very favorably with the rest of the country in proportionate earnings.

Some idea of the greater expense in Groups II and III may be formed when we consider that in 1894 Group II had 1,047 employes to every 100 miles of road; Group III, 518 employes to every 100 miles of road; whereas Group IV had only 360 employes to every 100 miles of road and Group V had only 316 employes to every 100 miles.

See Statistics of Railways (1894), p. 33.

DIAGRAM "I."

Capital,
2,300 millions.



Capital,
1,500 millions.

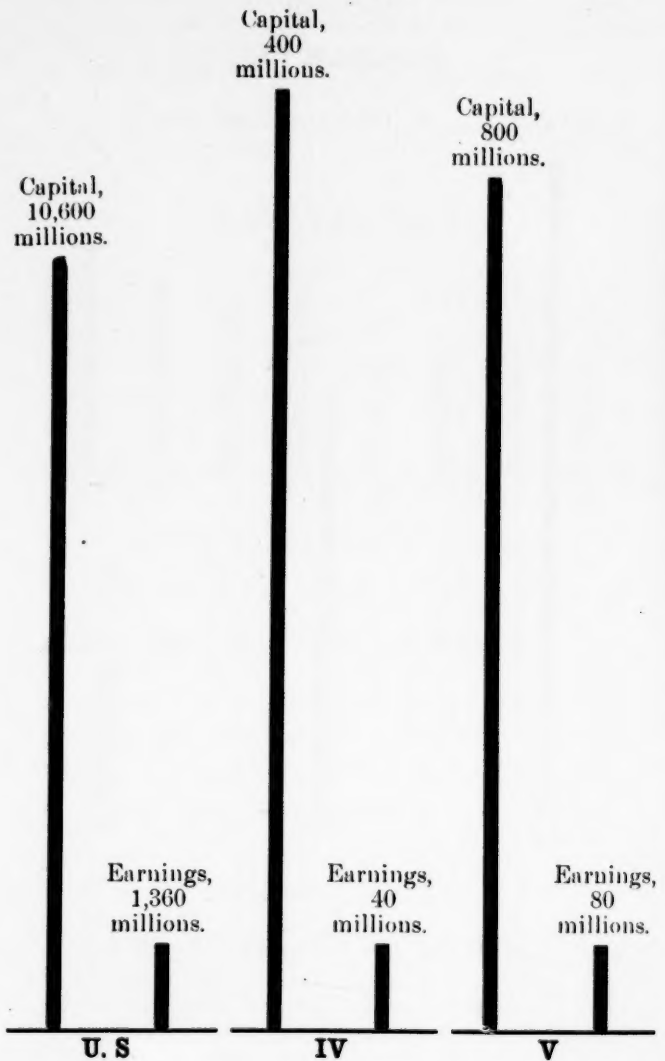


400 millions.



CAPITAL COMPARED.

Statistics of Railways, App. Diagram I.

DIAGRAM "J."

CAPITAL COMPARED WITH EARNINGS, 1894.

Statistics of Railways, Diagrams I and IV.

VARIOUS INCONSISTENCIES.

At page 77 of his brief counsel for the roads says :

"It is *the fact* of competition, and not *the kind* of competition, that constitutes the substantial dissimilarity in circumstances and conditions."

At page 102 he says :

"I do not contend that the *mere* fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections."

At page 58 of his brief counsel for the roads says :

"All competing lines, however numerous they may be, must accept the lowest rates offered by any one of them, or *all but one of them must abandon the competitive traffic.*" (Italics mine.)

At page 72 of his brief counsel for the roads says :

"If the competition at Charleston be real and such as to affect rates, the appellants must accept those rates or *abandon the competitive traffic.*" (Italics mine.)

At page 80 of his brief counsel for the roads takes an inconsistent position, showing that it is not necessary to abandon all the traffic. He says :

"I submit, however, that it is not necessary to show that a transportation line is capable of carrying *all* the traffic that passes between its termini."

And on page 81 he shows by a quotation from a memorial to Congress—

"That the country has grown so great in population, wealth, and diversified interests that it requires both railroads and rivers to meet the demands of its enormous interchange, and we could not dispense with either."

If the lines, both rail and water, are worked to their full capacity, and there is enough traffic or more than enough for all the lines, necessarily they will not have to abandon any, and the tendency will be to maintain or advance rates.

There is a great truth contained in this quotation from the memorial, and it completely contradicts and destroys the contention of the roads as to the necessity of abandoning traffic and going into bankruptcy.

It is said that Commodore Vanderbilt perceived this truth when he interested himself in railroads running along the Hudson, and in answer to some of his less far-seeing friends who took the false and narrow view that he was about to destroy by competition his interests in the boats on the river, said that there would in time be more traffic than either the railroads or the river could handle.

The statistics given by counsel for the roads at page 81 of his brief as to the increase of export grain at New Orleans from 500,000 to 18,000,000 bushels per year, since the construction of the jetties, is an excellent illustration of the benefits to railways that accrue from improvement of waterways, for the railroads handled and hauled a very large proportion of this traffic, and have received an immense increase in their business at New Orleans, and will in time carry the imports consisting of high-grade goods that will come to New Orleans, from the fact of ships entering that port in large numbers to take export traffic, bringing with them cargoes, so as not to make the voyage from Europe empty. This is the case at New York now. (See New York Produce Exchange *vs.* B. & O. R. Co., 7 I. C. C. R., 612.)

As was stated at page 35 of appellee's brief, waterways are complements and aids to railways when they are improved sufficiently to meet the demands of modern commerce.

**FALLACY OF ALLEGED ERRORS IN OPINION OF
CIRCUIT COURT OF APPEALS. RAIL LINES
ACTUALLY DO "PERFORM THE SERVICE"
BETWEEN CHICAGO AND NEW YORK IN
WINTER.**

At page 80 of his brief counsel for the roads gives a diagram showing the water line from Chicago and New York and four rail lines, the New York Central, the Erie, the Pennsylvania, and the Baltimore and Ohio running between the same points.

He attributes to the Circuit Court of Appeals error in holding that "competition of one transportation line cannot be said to meet that of another for the carriage of traffic from any particular locality, unless one line could perform the service if the other did not," and he seeks to prove his assertion by the above-mentioned diagram.

Unfortunately for the position of the roads on this point, the very illustration they give proves beyond doubt the correctness of the ruling of the Court of Appeals.

For it is a fact that when the lakes are closed by ice for six months in the year these lines not only can, but actually do "perform the service" and carry the traffic between Chicago and New York.

And when the lakes are open the water carriers, either through the Erie canal or by a transfer at Niagara falls and thence through the St. Lawrence and by ocean to New York, could "perform the service" if the rail lines did not.

Hence the effect on rates is immediate, direct, and prox-

imate, and, as a matter of fact, it acts instantaneously the moment the season for navigation opens on the lakes. Rates then go down, and when the lakes are closed they go up.

At page 82 of his brief counsel for the roads attributes another error to the Court of Appeals and draws a fallacious diagram.

In this he assumes that "It is quite evident that a line " which runs only between Boston and Chicago cannot carry " traffic between Chicago and New York."

He then proffers another hypothetical case as to Philadelphia and another as to Baltimore.

As a matter of fact, all these cities are connected with New York by rail lines and by water lines, and traffic reaching any of these cities, either Baltimore, Philadelphia, or Boston, can be taken to New York from those points by rail or ocean. As a matter of fact, millions of tons of freight originating at Chicago reach New York city via Philadelphia, Boston, and Baltimore.

The shortest line to New York from Chicago is via the Pennsylvania road, 912 miles.

It is this very fact that traffic originating at Chicago may pass from its point of origin via Boston, Baltimore, or Philadelphia to its point of destination, New York, and actually does so, that creates the competition by which rates to New York from Chicago are regulated.

The Pennsylvania road has not only the shortest line from Chicago to New York, but the shortest line to Baltimore, the distance being 802 miles from the western metropolis to Baltimore; thus, the latter city is 110 miles nearer to Chicago than the city of New York. Philadelphia is 90 miles nearer to Chicago than New York by the Pennsylvania road; hence, an immense amount of traffic reaches New York via these cities. The competition being thus always between the point of shipment and the point of destination, thus, the ruling of the Appeal Court is supported and not weakened by the illustration offered by the roads. The case at bar will be decided on facts, not theories; on realities, not suppositions.

THE DIFFERENTIALS.

At pages 82 and 83 of his brief counsel for the roads, without any apparent pertinence to the subject, brings in the matter of the differentials existing in favor of Baltimore and Philadelphia. These differentials have recently been the subject of a most elaborate examination by the commission *In re* New York Produce Exchange *vs.* Baltimore & Ohio Railroad Company, 7 I. C. C. R., 612.

The history of these differentials before and since they were adopted in 1882, at the recommendation of the distinguished advisory committee, composed of Allen G. Thurman, Elihu B. Washburne, and Thomas M. Cooley, is given, and in a most able report their effect is discussed and considered.

At page 618 the commission says:

"It would seem that the contentions between the carriers which had given rise to these differentials were mostly over *export* traffic, and that the differentials were insisted upon and allowed for the purpose of permitting various carriers to enjoy a portion of that traffic. The agreement of April 5, 1877, seems to have been made upon the idea of equalizing the cost of carriage from various interior shipping points to foreign ports. It recognized the fact that ocean freight rates from Baltimore and Philadelphia to such foreign ports were higher than from New York, and that inland freights must be correspondingly lower so that the total freight might be the same."

At page 620: "The purpose of the differential was to equalize the cost of *exporting grain* and other merchandise through the various ports to which they were applied."

At pages 623, 624: "The agreement of April 5, 1877, by which these differentials were originally fixed, recognized as their justification the fact that ocean freights to European markets were less from New York than from Baltimore and Philadelphia, and that the inland rates to New York ought to be correspondingly higher in order to equalize the through rate."

"It appeared that this *export business* was largely done by grain brokers. These people do not as a rule own the grain themselves nor carry stocks from which their orders are filled. Upon receiving an order they go into the market and fill it at the least price possible. They sometimes sell the grain on board the vessel on this side, but ordinarily it would appear that their price includes a *delivery in Europe*."

At page 634: "These brokers have no stock in trade. They have no expensive plant which they must utilize at a particular point."

"While for the most part they reside in New York, they can, with almost equal convenience, do business through any one of the three ports."

At page 659: "The controlling purpose of the differentials is to distribute between rival railway lines the *export traffic* which moved from the West to the Atlantic seaboard."

At page 662: "Mr. George R. Blanchard, the commis-

"sioner of that association, stated in his testimony before the commission the theory upon which these differentials were fixed. As we understand the testimony upon that point it was this: A considerable part of the grain in question is actually shipped from the city of Chicago. Almost all of it is purchased upon the basis of the Chicago market price. Chicago may therefore be treated as the point of origin. The largest foreign market is Liverpool, and that, for the purpose of illustration, may be treated as the point of destination. Now the object of these differentials is to make the cost of transporting this grain from Chicago to Liverpool the same through all these ports." (Italics mine throughout.)

Now, we respectfully ask, what has all this got to do with the case at bar? What possible bearing has it upon the subject? These differentials relate to "export traffic," international traffic.

Appellee is quite prepared to say there should be international rates for international freight, as this court practically decided in the Import Rate case, 162 U. S., 197. There should also be interstate rates for interstate freight and local rates for local freight.

We have no question of "export traffic" in the case at bar. Mr. Behlmer does not complain because traffic is carried to Liverpool through Charleston for less than he pays.

I can see no relevancy whatever to the case at bar in this subject of differentials. There is no question of competing markets, for Chicago sells and Liverpool buys; the business of Baltimore, New York, and Philadelphia is strictly one of brokerage, and the only competition is between the transportation lines as to who shall do the carrying.

The only relevancy is as to the rates being affected by competition between the point of shipment and the point of destination, Chicago and Liverpool respectively. The rail carriers have agreed to equalize these international rates rather than make war for the traffic.

New York having cheaper ocean rates than the other cities, this advantage is equalized by imposing a differential on New York.

Without further comment we dismiss the subject, remarking, however, that in spite of the fact that the differentials are against New York city, by her superior advantages in concentrated capital, storage capacity of elevators, more numerous and frequent lines to Europe, &c., she attracts three-fourths of the imports and from twenty-five to fifty per cent. of the exports of the entire Atlantic seaboard, showing conclusively that the raising of a rate does not always

deprive a place of its commerce or destroy its railway lines and throw them into bankruptcy by taking away their business. In other words, rates are not the only things considered in commerce, nor are they the only factors that cause goods to move from one point to the other.

So the learned circuit judge in the case at bar was entirely incorrect in following counsel for the roads in supposing that if the rate from Memphis were raised (which no one has asked) no hay at all would come from Memphis, it having been proved that hay in Memphis is from \$2 to \$5 per ton cheaper than in New York (Trans., p. 78).

PRICES AND SUPPOSITIONS.

At page 83 of his brief counsel for the roads tells us a self-evident truth that whether or not grain or hay will be shipped to Charleston depends on two things, the price and the freight rate. No one can doubt this. Unfortunately for the roads, however, there is not a word in the testimony as to prices from any point except Memphis and New York.

No prices are given from Boston, Philadelphia, or Baltimore. The only evidence in the record shows that Memphis has an average of \$3.50 per ton in her favor over New York (Trans., p. 78), and that the hay and grain which reaches Charleston whether via New York or elsewhere originates in the West (Trans., p. 63).

After laying down this self-evident proposition which no one has ever doubted or disputed, he goes on to "suppose" that if Boston, New York, Philadelphia, Baltimore, Chicago, and Memphis all sold at the *same price*, the movement would depend on the lowest freight rate. As a general abstract wholly irrelevant proposition this is true. I say general proposition, because it might be that a buyer, wholesale or retail, being able to get credit or some other convenience in any one of the cities mentioned, on that account, would prefer even paying a greater freight rate, or he might like the quality of the article better in one place than the other and prefer paying a greater freight rate on that account.

We venture to suggest nevertheless that however interesting these speculations may be, that it is hardly useful to "*suppose*" prices to be the same and base an argument upon "*a supposition*" which is contradicted by the testimony in the case at bar.

If suppositions are in order, however, appellee begs leave to "*suppose*" that we consider the case at bar, "*suppose*" we confine our attention to the facts appearing in the record, "*suppose*" we discard theories, "*suppose*" we regard conditions.

OBJECTIONS TO FORM OF COMMISSION'S REPORT CANNOT BE RAISED FOR FIRST TIME ON APPEAL. COURT FORMS ITS OWN JUDGMENT.

At page 92 of his brief my friend cites a passage from the opinion of Judge Clark (73 F. R., 414) to the effect that the report of the commission is not in proper form. At pages 171-179, inclusive, he elaborates this idea.

No such question was made below, and it is raised for the first time here, "in order that errors may be taken advantage of on review, the objections must have been raised in the court below" (*Northern Pac. R. Co. vs. Mores*, 123 U. S., 710).

The decision of Judge Clark has been appealed from, as I am informed, by the commission, and it is worthy of note that he says the Social Circle case does not change his views, and he adheres to the position that the court cannot modify the order of the commission.

In the "Social Circle case" the order of the commission was modified, and the Supreme Court affirmed the judgment of the Circuit Court of Appeals.

In the Import case it was said the court should "either inquire into the facts on its own account, or send the case back to the commission." * * *

This should settle the question. The court will not do a useless thing (*California vs. R. R. Co.*, 149 U. S., 308; 1 Black, 419; 8 Wall., 333; 8 How., 251; 116 U. S., 138; 134 U. S., 547; 141 U. S., 696; 106 U. S., 578). Hence, unless the courts can render a judgment, why should they make any inquiry?

The *Brimson* case, 154 U. S., 447, conclusively establishes that the court not only may, but must, render its own judgment in matters arising under the interstate commerce act, finally and conclusively determining the issues between the parties.

It was there held that on the application of the commission the functions of the court are not merely ministerial and confined to carrying out the wishes of the commission, but that the court itself is to render final and conclusive judgment.

The application of the commission in that case was under section 12 of the act, invoking the aid of the court in requiring the attendance of a witness. The case came to the Supreme Court on an appeal from a judgment of the court below dismissing the petition. The lower court was reversed. At page 487 this court says: "The proceeding is

"one for determining rights arising out of specified matters
 "in dispute that concern both the general public and the
 "individual defendants. It is one in which *a judgment* may
 "be rendered that will be conclusive upon the parties until
 "reversed by this court. And *that judgment* may be en-
 "forced by the process of the Circuit Court. Is it not clear
 "that there are here parties on each side of a dispute in-
 "volving grave questions of legal rights, that their re-
 "spective positions are defined by pleadings, and that the
 "customary forms of judicial procedure have been pursued.
 "The performance of the duty, which, according to the con-
 "tention of the Government, rests upon the defendants, can-
 "not be directly enforced except by judicial process. One
 "of the functions of a court is to compel a party to perform
 "a duty which the law requires at his hands. If it be
 "adjudged that the defendants are, in law, obliged to do
 "what they have refused to do, that determination will not
 "be merely ancillary and advisory, but, in the words of
 "*Sanborn's case*, will be a 'final and indisputable basis of
 "'action,' as between the commission and the defendants,
 "and will furnish a precedent in all similar cases. It will
 "be as much a judgment that may be carried into effect by
 "judicial process as one for money, or for the recovery of
 "property, or a judgment in mandamus commanding the
 "performance of an act or duty which the law requires to
 "be performed, or a judgment prohibiting the doing of
 "something which the law will not sanction. It is none
 "the less the judgment of a judicial tribunal dealing with
 "questions judicial in their nature, and presented in the
 "customary forms of judicial proceedings because its effect
 "may be to aid an administrative or executive body in the
 "performance of duties legally imposed upon it by Congress
 "in execution of a power granted by the Constitution."

And again, at page 489, the court says:

"We are of opinion that a judgment of the Circuit Court
 "of the United States determining the issues presented by
 "the petition of the Interstate Commerce Commission, and
 "by the answers of the appellees, will be a legitimate exer-
 "tion of judicial authority in a case or controversy to which,
 "by the Constitution, the judicial power of the United States
 "extends."

Again, at page 478:

"As the issues are so presented that the judicial power is
 "capable of acting on them *finally* as between the parties
 "before the court, etc." (*Italics mine.*)

Now, when we come to the broad terms of section 16 itself,
 there seems to be no room left for the slightest quibble that
 the court is not to render its own judgment, final and con-

clusive, between the parties. By the terms of the statute the "court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but, in such manner, as to do justice in the premises, and, to this end, such court shall have the power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of said petition, and, on such hearing, the findings of fact in the report of said commission shall be *prima facie* evidence of the matters therein stated."

What language could give broader powers or more ample scope for the action of the court "*to do justice in the premises*" and "*to form a just judgment in the matter of said petition.*"

It is vested with the fullest power of inquiry and is required to give its own judgment.

Unquestionably a statutory authority is to be strictly followed, but applying that rule here, the court, far from being bound down to the order of the commission, is, by the terms of the act itself, obliged "*to form a just judgment*" of its own, and, in the words of the Brimson case, "a judgment" "that will be conclusive upon the parties until reversed," "the issues are so presented that the judicial power is capable of acting on them *finally.*"

To our minds the Supreme Court has indisputably settled the point, and it is established law that the court may modify the order of the commission so "as to do justice in the premises" and "form a just judgment in the matter," "as a court of equity," in the words of the statute.

The Alabama Midland case is also conclusive on the point.

We also call the attention of this court to the fact that we have not availed ourselves of the permissive clause in the section, dispensing with "the formal pleadings and proceedings applicable to ordinary suits in equity," but have filed a regular formal bill in equity, and the judgment in the Circuit Court below was that "the bill is dismissed."

In his brief in the Social Circle case filed in the Supreme Court, counsel for the roads says, at page 158:

"The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of, and report upon, matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by law, the commission may be regarded as the general referee of each and every Circuit Court of the United States, upon which the

"jurisdiction is conferred of enforcing the rights, duties and obligations imposed by the act."

37 Fed. R., p. 613, *K. & I. B. Co. vs. L. & N. R. R.*

The case is heard "*de novo*, upon the pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters of controversy."

37 F. R., 614, *K. & I. Bridge Co. vs. L. & N. R. R.*

43 F. R., 43, *I. C. C. vs. B. & O. R. R. Co.*

48 F. R., 177, *I. C. C. vs. L. V. R. R. Co.*

50 F. R., 295, *I. C. C. vs. A., T. & S. F. R. R. Co.*

56 F. R., 926, *I. C. C. vs. C. N. A. & T. A. R. R.*

62 F. R., 963, *Shinkle & Co. vs. L. & N. R. R. Co.*

In view of all this we think Judge Clark's opinion of somewhat doubtful authority; but, as we said above, the point, not having been raised below, cannot be considered here.

MILEAGE RATES AND EQUALITY.

It should hardly be necessary to do so after our distinct disavowal made heretofore, but, as a matter of precaution, we now say again that neither appellee nor the commission nor the Circuit Court of Appeals nor anybody else has in this proceeding contended or ordered or urged or demanded that rates be made on a mileage basis, or that distance be regarded as a controlling factor, as appellant charges at page 107 of his brief.

Counsel for the roads seems to think that it is only necessary to assert that a court or the commission or a party takes a particular position never even dreamed of by them, upon which he proceeds to demolish that "supposed" position.

As we remarked before, "suppose" we consider facts and not theories.

Now, counsel for the roads "supposes" at pages 109, 110, 111 of his brief that Judge Severens and the Circuit Court of Appeals in the case at bar meant to contravene the canons of the common law by using the term "equality." Surely he cannot mean to impute that these learned courts contended that rates should be the same all over the country, regardless of the fact as to whether or not the services rendered were similar.

It must be remembered that both Judge Severens and the Circuit Court of Appeals had found as a matter of fact that in the cases before them the circumstances were substantially similar, and it was in relation to those cases that both courts used the term "equality."

Surely counsel for the roads will not impute ignorance to this court in using in the Goodridge case, 149 U. S., 690, the language followed by Judge Goff, to wit:

"The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises or to build up new industries, but, deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public to extend them reasonable facilities for the transportation of their persons and property, and to *put all its patrons upon an absolute equality.*" (Italics mine.)

Surely counsel for the roads will join appellee in "supposing" that Judge Severens and Judge Goff and this court in using the term "equality" at least knew some law, on the proposition as to the common-law requirement of equality of rates for similar services—a proposition never disputed by appellee.

THROUGH ARRANGEMENTS.

At page 137 of his brief counsel for the roads says that the appellants whose roads are west of Augusta are under no obligation to make joint through rates with the S. C. & G. R. R.

In reply we say that question does not arise here, and we plant ourselves firmly on the Social Circle case. At pages 398, 399, 400, 5 I. C. R., and pages 191, 192, 193, 162 U. S., the Supreme Court says:

"Upon this part of the case the conclusion of the Circuit Court was that the traffic from Cincinnati to Social Circle, in issue as to the Georgia Railroad Company was local, and that that company was not, on the facts presented, made a party to a joint or common arrangement, such as make the traffic to Social Circle subject to the control of the Interstate Commerce Commission.

"We are unable to accept this conclusion. It may be true that the 'Georgia Railroad Company,' as a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying between points in Georgia freight that has been brought from another State. It may be that if in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could

"undertake such transportation free from the control of any
 "supervision except that of the State of Georgia. But when
 "the Georgia Railroad Company enters into the carriage of
 "foreign freight, by agreeing to receive the goods by virtue of
 "foreign through bills of lading, and to participate in through
 "rates and charges, it thereby becomes a part of a contin-
 "uous line, not made by a consolidation with the foreign
 "companies but made by an arrangement for the continuous
 "carriage or shipment from one State to another, and thus
 "becomes amenable to the Federal act, in respect to such
 "interstate commerce. We do not perceive that the Georgia
 "Railroad Company escaped from the supervision of the
 "commission, by requesting the foreign companies not to
 "name or fix any rates for that part of the transportation
 "which took place in the State of Georgia when the goods
 "were shipped to local points on its road. It still left its
 "arrangement to stand with respect to its terminus at Au-
 "gusta and to other designated points. Having elected to
 "enter into the carriage of interstate freights and thus sub-
 "jected itself to the control of the commission, it would not
 "be competent for the company to limit that control, in re-
 "spect to foreign traffic, to certain points on its road and
 "exclude other points. * * *"

"All we wish to be understood to hold is, that when goods
 "shipped under a through bill of lading, from a point in
 "one State to a point in another, and when such goods are
 "received in transit by a State common carrier, under a con-
 "ventional division of the charges, such carrier must be
 "deemed to have subjected its road to an arrangement for a
 "continuous carriage or shipment within the meaning of the
 "act to regulate commerce. When we speak of a through
 "bill of lading we are referring to the usual method in use
 "by connecting companies, and must not be understood to
 "imply that a common control, management or arrange-
 "ment might not be otherwise manifested."

At page 82, Trans., is the through bill of lading from
 Memphis to Summerville on which Behlmer shipped his
 goods.

It will be time enough to discuss the question of compul-
 sion when it arises. It is not in this case.

Nevertheless, in passing we may remark that when it
 does come up much can be said against our friend's posi-
 tion. In the language of the Wabash case "continuous
 transportation from one end of the country to the other,"
 118 U. S., 571, is of supreme importance, and in the lan-
 guage of the Supreme Court in the case of *The Daniel Ball*,
 10 Wall., 565, "the fact that several different and independent
 "agencies are employed in transporting the commodity,

"some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

The commerce act says the "aggregate" rate shall be reasonable, and in one of the cases quoted by my friend, *The A., T. & S. F. v. D. & N. O. R. R.*, 110 U. S., 680, the court, after holding that they could not force the railroads into a business arrangement and compel stoppage at a junction away from the main depot for a transfer of passengers and freight, or into "a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage and the like," goes on to say "when a business connection shall be established between the Denver and New Orleans Company and the A., T. & S. F. R. R., at their junction, for the transportation of persons and property coming from or going to the Denver and New Orleans different questions may arise, but so long as the situation of the parties continues as it is now, we cannot say that, as a matter of law, the prices charged by the A., T. & S. F. for the transportation of persons and property coming from or going to the Denver and New Orleans, must necessarily be the same as are fixed for the continuous line over the Denver & Rio Grande" (684).

"Our attention has been called to several cases in the English courts where the question of reasonable or unreasonable preference by railway companies has been considered, but they all arose under the railway and canal traffic act, 1854, 17 and 18 Vic., 31, and furnished but little aid in the determination of the present case. They are instructive and of high authority as to what would be undue or unreasonable preferences among competing customers, but none of them relate to the rights of connected railroads where there is no provision in law for their operation as continuous lines for business. And here it is proper to remark in the very act under which these cases arose it is provided that 'every railway company * * * 'working railways * * * which form part of a continuous line of railway * * * communication * * * shall afford all due and reasonable facilities for receiving and forwarding by one of such railways * * * all traffic arriving by the other, without any unreasonable delay, and without any * * * preference or advantage, or prejudice or disadvantage * * * and so that no obstruction may be afforded to the public desirous of using such railways * * * as a continuous line of

“communication, and so that all reasonable accommodation
 “may, by means of the railways * * * of the several
 “companies, be at all times afforded to the public in that
 “behalf.” If complaint was made of a violation of this pro-
 “vision, application could be made to the courts for relief,
*“were there such a statute in Colorado, this case would come
 “before us in a different aspect.”* As it is, we know of no power
 “in the judiciary to do what the Parliament of Great Britain
 “has done, and what the proper legislative authority ought
 “perhaps to do for the relief of the parties in this contro-
 “versy.” (*Italics mine.*)

Since then the act to regulate commerce has been passed, and, in section 3, carriers are required to furnish “equal facilities” for the interchange of traffic between their respective lines.” Section 7 makes it unlawful, by any “agreement,” “by change of time schedule,” “carriage in different cars, or by other means or devices,” to prevent “the carriage of freight from being continuous from the place of shipment to the place of destination.”

In a recent English case, we find “facilities” in subsection 3 of section 23 includes the charging of the rates above mentioned in subsection 1. A “through rate” is a “facility.” Railway and canal traffic act, 1888, s. 25, sect. 23, is really aimed at the charging of through rates.

Argument of Balfour Brown, Q. C.

Barry R'y v. Taff Vale R'y Co., Law Rep. Q. B. Div., 1895, vol. 1, p 134.

Lindley, L. J., page 139 of same case, says:

“Whether the expression in subsection 3, ‘facilities, herein provided for,’ includes the granting of facilities at the rate beforementioned, or whether it is confined to facilities apart from the rate, is by no means any easy question to answer; but I will assume that ‘the facilities herein provided for’ does include facilities at the rate beforementioned.”

But, as we said at the outset, this interesting question does not arise here.

PROPHECIES WHICH “AGE CANNOT WITHER NOR CUSTOM STALE.”

There are in the case at bar, as I presume in every other similar case, the usual prophecies.

At page 166 of his brief counsel for the roads says:

“In other words, if the courts compel carriers in the Southern territory to accept to all of their stations, rates as

"low as those which competition compels them to accept to the longer-distance competitive points, the result must be the universal bankruptcy of the Southern Railway system."

The novelty never seems to wear off of these prophecies. In the Social Circle case, at page 140 of his brief filed in this court, counsel for the roads says:

"The towns will decline so soon as the railroads, upon which their real prosperity depends, shall be bankrupted, as they certainly will be, if the construction of the commission is to be immediately enforced in the South Atlantic group of States."

It will be remembered that the Social Circle case would ruin the roads if this court sustained the commission. Strange to say, the inevitable crash has not come yet. Now it is the Behlmer case that is to produce this cataclysm. The Joint Traffic decision was sure to ruin the country and cause the heavens to fall. The sun still shines and the roads still run. Possibly all these matters are to be taken in a Pickwickian sense.

At all events, as there can be no interference whatever with any other than interstate rates, all these prophecies, based upon the idea that local rates are to be affected, are without foundation.

Counsel for the roads went outside of the record in the Circuit Court of Appeals and ascribed to the interstate commerce act certain losses to the roads during the five years next succeeding the year 1888, asserting that these losses amounted to \$525,459,587.

Counsel's *post hoc propter hoc* argument does not hold, and he could hardly prove, even if he had attempted it in the trial court, that the Baring failure and the slump in Argentina, and the outflow of gold, and the unloading of "American rails" by the London market, and the great panic, are due to our interstate commerce act.

As Sir Charles Russell said before the Behring Sea Commission, we admire "the courage—I will not say audacity—" of these arguments, used to make a brave front in a bad cause.

This court will not be "frighted from its propriety" by immense figures that have nothing to do with this case. We might swell the loss of the public to billions if we went into the census figures. In the food-product inquiry it appeared that Iowa alone would lose \$5,000,000 a year by addition of seven cents in the rate of transportation. Moreover, the roads in the United States do not seem to be exactly starving, for, according to Diagram 4, Statistics of Railways, 1894, they earned—

In 1888.....	\$1,000,000,000
" 1889.....	1,080,000,000
" 1890.....	1,180,000,000
" 1891.....	1,240,000,000
" 1892.....	1,300,000,000
" 1893.....	1,360,000,000
Total.....	\$7,160,000,000

These earnings show a steady increase each year, and for the five years mentioned by my friend an increase of \$360,000,000 over 1888. Does this not prove that the operation of the law has increased the volume of business and, therefore, the earnings by a wise reduction of rates, and has thus benefited the roads? On the total capital of the United States for 1894 they earned over 11 per cent. according to these figures.

The statement of the Supreme Court, 143 U. S., 343, that "a reduction of rates will increase the amount of business and, therefore, the earnings" seems amply proved by these figures. And it must not be forgotten that these earnings of \$1,360,000,000, or over 11 per cent. on the total capital of the United States, were made on a capital including such roads as the Union Pacific, and "it is a part of the public history of the country, of which the court will take judicial notice, that for the first \$36,000,000 of stock issued this company received less than two cents on the dollar, and "that the profit of construction represented by outstanding bonds was \$43,929,328.34" (*Ames vs. Union Pac. R. R. Co.*, 62 F. R., 13).

So, if we had been accorded the opportunity of having these issues made below or in the pleadings, we might have been able to disabuse counsel for the roads of some of these ideas.

A SAMPLE SOPHISM.

At page 77 of his brief counsel for the roads says: "The Hudson River railroad runs up the eastern shore of the Hudson river, from New York to Albany. The West Shore railroad runs up the western shore of that river, from Jersey City to Albany.

"According to the theory of the commission, and the majority of the Court of Appeals, each road may compete for traffic against other lines on its own side of the river; but neither of them can do anything to promote the traffic upon its own side of the river. In other words, New York railroads may compete with New York railroads, and

"Jersey City railroads may compete with Jersey City railroads; but New York railroads must not compete with Jersey City railroads."

This is not a new idea, but is precisely the same one that counsel for the roads has been using for years. It appears in all his briefs in the Social Circle case, and it is catchy in appearance, and it imputes "anxious fatuity" to the commission and the Circuit Court of Appeals.

However, it is based as usual on a "supposition" contradicted by the facts.

It supposes that the commission and the courts have made such a ruling. They have not. In truth, they have ruled just the reverse.

They have ruled that water competition between the point of shipment and the point of destination is *prima facie* a substantially dissimilar circumstance, *ipso facto* relieving the railroad from the operation of the act. Hence the presence of the Hudson river relieves the roads on one side of the river, and at the same time relieves the roads on the other. The roads on each side are put on equal terms with the river. This necessarily puts them on equal terms with each other. Both the commission and the courts know that things which are equal to the same thing are equal to each other, and they have never made the ruling attributed to them by counsel for the roads.

AVERAGE RECEIPTS PER TON PER MILE.

In one of his briefs in these cases, from which many extracts are used in the case at bar, counsel for the roads attempts to prove that "average receipts per ton per mile" are of no value except to show the proportion of high-class or low-class traffic on a road. He then gives an illustration:

"To demonstrate this fact mathematically, let us assume that the tonnage of any given road is equivalent to 2,000,000 tons carried one mile in each of three consecutive years. During the first year, let us assume that one-fourth of the tonnage was class 1, and carried at 5 cents per ton; and that three-fourths of the tonnage was class A, and carried at 1 cent per ton. We have:

" 500,000 tons of class 1 at 5 cents.....	\$25,000
" 1,500,000 tons of class A at 1 cent.....	15,000

"Or, 2,000,000 tons at 2 cents \$40,000

"which shows that the 'average receipts per ton per mile' were, for the first year, 2 cents.

"During the second year, let us assume that one-half of the tonnage was class 1, and carried at 5 cents per ton; and that the other half was class A, and carried at 1 cent per ton. We have:

" 1,000,000 tons of class 1 at 5 cents.....	\$50,000
" 1,000,000 tons of class A at 1 cent.....	10,000

"Or, 2,000,000 tons at 3 cents \$60,000

"which shows that the 'average receipts per ton per mile' were, for the second year, 3 cents.

"During the third year, let us assume that three-fourths of the tonnage was class 1, and carried at 5 cents per ton, and that the remaining one-fourth was class A, and carried at 1 cent per ton. We have:

" 1,500,000 tons of class 1 at 5 cents.....	\$75,000
" 500,000 tons of class A at 1 cent.....	5,000

"Or, 2,000,000 tons at 4 cents \$80,000

"which shows that 'the average receipts per ton per mile' were, for the third year, 4 cents.

"We see that, though the tonnage remained the same, and though the rates charged on class 1 and class A respectively remained the same during all three of the years, the 'average receipts per ton per mile' for the third year was double what it was for the first year; and we see that it increased precisely as the proportion which the high-class traffic bears to the low-class traffic increased. But the demonstration does not throw any light whatever upon the reasonableness of the rates either on class 1 or class A."

It will be observed that, besides showing a carriage of high-class goods, the "average receipts" come very near showing the "receipts," as well as the proportion of high-class traffic.

For instance, it will be seen that on the same tonnage: In the first year an "average of 2 cents" produced \$40,000; in the second year an "average of 3 cents" produced \$60,000; in the third year an "average of 4 cents" produced \$80,000.

With the increase of the average rate per ton per mile the total receipts increased, as was quite natural if not inevitable.

Hence the "average receipts per ton per mile" show, amongst other things, the "receipts," as might be expected.

Of course it is unfair to compare an "average" produced by including high-grade goods with the "average" of low-grade goods, for by including the high-grade freight the

"average" is swelled, and it is unjust to compare them. Hence we say in the case at bar, it is unfair to compare the average of *all* classes of freight, as has been done by General Manager Ward (Trans., p. 75), with the average of this low-grade freight, hay and grain.

It is a strong argument against the reasonableness of a charge of 2.1 cents per ton per mile on grain to show that the average earnings on *all* freight, high grade and low, is about 7 mills per ton per mile (Trans., p. 75).

The fallacy of the contention of counsel for the roads that these figures only indicate the *class* of traffic carried is well demonstrated in the fact that under this theory the S. C. & G. R. R. must carry high-class traffic, as its "receipts per ton per mile" in this case are 2.1 cents (Trans., p. 82).

At page 74, Trans., however, General Manager Ward testifies that three-fourths of the business of the road is composed of low-grade freight.

As to the illustrations, pages 158, 159, 161, 162 of his brief, given by counsel for the roads, showing that an injustice would be done by making a merchant sell his stock of silks and such articles at the same price he sells his salt and flour, and that it would be wrong to make a merchant do at wholesale prices his retail business, we quite agree with him, and we adopt this illustration as an argument to show that it is wrong for the railroads to sell their wholesale long-distance interstate transportation at retail, local, short-haul *infra*-State prices, and that is what the commission and the Circuit Court of Appeals has decided, and it is what this court decided in the Social Circle case.

And it is what this court decided in Interstate Com. Com. *vs. B. & O. R'y*, 145 U. S., 281, when it held that a party-rate ticket might be sold or wholesale business done at a cheaper rate than that charged for a single ticket or retail business.

In the Party Rate case, 145 U. S., at page 281, Mr. Justice Brown said:

"To bring the present case within the words of this section, we assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the *universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale*, this is impossible." (Italics mine.) It is therefore unreasonable to impose local retail prices on this through interstate traffic from Memphis to Summerville.

Respectfully submitted.

CLAUDIAN B. NORTROP,
Solicitor for Appellee.



No. 46.

Motion to modify

Office Supreme Court U. S.
FILER

FEB 5 1900

De Cree Clerk.

Supreme Court of the United States

Filed Feb. 5, 1900.

OCTOBER TERM, 1899.

No. 46.

THE LOUISVILLE AND NASHVILLE RAILROAD
COMPANY ET AL., APPELLANTS,

228.

HENRY W. BEHLMER, APPELLEE.

MOTION TO MODIFY DECREE

And now comes Claudian B. Northrop, Counsel for Appellee, as of record, and moves the Court to modify its decree herein, by ordering that each party pay his own costs, instead of decreeing that all the costs of all the various tribunals be paid by Appellee.

Respectfully submitted,

CLAUDIAN B. NORTHROP,

Counsel for Appellee.

The attention of the Court is called to the fact that in its opinion it was pointed out that pending the progress of this cause through the Courts below, and since it was heard by the Inter-State Commerce Commission, this Court has handed down several decisions, settling the law on the much disputed and intricate question of competition. This Court evidently intended to indicate that the Commission and the lower Courts should be excused for erring in their interpretation of the law in this case, for the reason that the law was unsettled and undecided at the periods when this cause was before the lower tribunals.

May it not be hoped that Appellee will likewise be excused on this ground, and that his estate will not be mulcted with the entire costs? He has already paid all the costs in Circuit Court of Appeals.

It would be a hardship to cast all the costs on Appellee, because two out of the three lower tribunals misconceived the law which was afterwards settled. Appellee takes the liberty of assuming that this was not intended.

Leave is also respectfully asked, to point out, that Appellee in all the lower tribunals expressly requested that competition should be considered, and that all the *facts* relating thereto should be weighed, and that printed requests for findings of fact were filed before the Commission, on the point of competition, and on the issue of reasonableness.

Appellee was anxious to have the *facts* of his case passed on, and endeavored to avoid doubtful matters of law. It is not his fault that his efforts failed.

He began these proceedings with the practical business

object of opening a flour and grist mill in the town of Summerville, the prevailing rates prohibiting the enterprise.

In the event of final failure his intention was to invest his capital, and locate at a long distance point or "trade center." He had considerable confidence in that provision of the Act which requires that the tribunals "shall proceed to hear and determine the matter speedily."

Respectfully submitted.

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.

Syllabus.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* BEHLMER.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 46. Argued April 17, 18, 1899. — Decided January 8, 1900.

The conceded facts from which it has been assumed in this case, as a matter of law, that the railway carriers were operating "under a common control, management or arrangement for a continuous carriage or shipment" were as follows: The several carriers transported hay from Memphis under through bills of lading, by continuous carriage, to Summerville and Charleston. The several roads shared in an agreed rate on traffic to Charleston and in a precisely equal in amount rate on traffic to Summerville. On shipments to Summerville, however, there was added to the Charleston rate the amount of the local rate from Charleston to Summerville, the benefit of which additional exaction was solely received by the local road on which Summerville was situated. The contention that under this state of facts the carriers did not constitute a continuous line, bringing them within the control of the Act to regulate Commerce, is no longer open to controversy in this court. In *Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 184, which was decided after this case was before the Commission and the Circuit Court, it was held under a state of facts substantially similar to that here found that the carriers were thereby subject to the Act to regulate Commerce.

It is settled by previous decisions that the construction given in this cause by the Interstate Commerce Commission and the Circuit Court of Appeals to the fourth section of the Act to regulate Commerce was erroneous, and hence that both the Interstate Commerce Commission and the Circuit Court of Appeals mistakenly considered, as a matter of law, that competition, however material, arising from carriers who were subject to the Act to regulate Commerce could not be taken into consideration; and likewise that all competition, however substantial, not originating at the initial point of the traffic, was equally as a matter of law excluded from view.

What was decided in the previous cases was that under the fourth section of the act substantial competition which materially affected transportation and rates might under the statute be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and mate-

Statement of the Case.

rial effect upon traffic and rate making, was proper under the statute to be taken into consideration.

It follows that while the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: *First*: The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. *Second*: That the competition relied upon be, not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making, the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered.

THIS controversy was commenced on December 29, 1892, when Henry W. Behlmer, a resident of Summerville, South Carolina, and a wholesale hay and grain dealer therein, began proceedings, before the Interstate Commerce Commission, under the Act to regulate Commerce, passed February 4, 1887, as amended, to restrain the continuance of acts asserted by him to be a violation of the statute referred to. The petition was filed by Behlmer on his own behalf, and that of the other merchants, residents of Summerville, and the parties complained of were The Memphis and Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railroad Company, The Georgia Railroad and Banking Company (the owner of a railroad designated as the Georgia Railroad), The South Carolina Railway Company, and other companies and individuals, who were averred to be lessees or receivers of some of the above-named companies. All the lines of railroad mentioned were asserted to be members of a combination styled The Southern Railway and Steamship Association.

It was averred that the defendants were carriers under a common control, management or arrangement, for continuous carriage, and were engaged in the transportation of passengers and property wholly by railroad, between Memphis in the State of Tennessee and Summerville in the State of South Carolina and through Summerville to Charleston. The distance be-

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tween Memphis and Summerville was averred to be 748 miles, as follows: Between Memphis and Chattanooga, 310 miles over the Memphis and Charleston Railroad; between Chattanooga and Atlanta, Georgia, 152 miles over the East Tennessee, Virginia and Georgia Railroad; from Atlanta to Augusta, Georgia, 171 miles over the Georgia Railroad; and from Augusta, Georgia, to Summerville, South Carolina, 115 miles over the South Carolina Railway. The principal subject of complaint was that though Summerville was twenty-two miles west of Charleston and was that distance nearer to Memphis, where the hay and grain shipments originated, yet the defendants exacted from the petitioner and other merchants of Summerville a freight charge of twenty-eight cents per hundred pounds for hay, carried from Memphis to Summerville, while only nineteen cents per hundred pounds were charged for the same article when carried to Charleston, the longer distance. It was averred that the rate of twenty-eight cents to Summerville was made up of the through rate to Charleston, with the addition of the local rate from Charleston to Summerville of nine cents per hundred pounds. It was also alleged that the shipments of hay to Summerville were made over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions. The freight charges complained of were averred to be in violation of the fourth section of the Act to regulate Commerce, commonly referred to as the long and short haul clause. Besides, it was alleged that the local rate between Summerville and Charleston of nine cents per hundred pounds was excessive and unreasonable, and that such also was the case as regards the charge of twenty-eight cents from Memphis to Summerville, and hence such charges were in violation of the first section of the Act to regulate Commerce. It was also asserted that the discrimination and excessive rates against Summerville existed not only on hay, "but on all articles of interstate commerce coming to that place, much to the detriment and disadvantage of the town and the business of its merchants."

In their answers certain of the defendants conceded that they were subject to the Act to regulate Commerce, while

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others, though admitting that they were common carriers and engaged in the transportation of passengers, wholly by railroad between points in the States of Tennessee and South Carolina, averred that they had no joint through tariff from Memphis to Summerville, and therefore had no "line" from Memphis to Summerville, in the sense of the Act to regulate Commerce, and were in consequence not affected by the statute. All the defendants averred that the aggregate freight rate on hay carried from Memphis to Summerville, as well as the local rates from Charleston to Summerville, were just and reasonable. By some of the defendants it was alleged that the transportation of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, and hence the carriers were justified in making a lesser charge to Charleston than was made to Summerville, the shorter distance. The dissimilarity alleged was asserted to have been caused, first, by the existence between Memphis and Charleston of at least eight competing lines of railroad, and, second, by the competition by sea, on hay and grain, and freight of that class, originating in Chicago, New York and Eastern points, and destined to Charleston via the lakes, canal and ocean, and by part water and part rail. The exact conditions of the competition existing at Charleston because of its situation on the seaboard and consequent relations with many markets other than Memphis, was stated in the joint and several answers of the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company as follows:

"(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other Eastern ports from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from North Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

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"(Third.) The rates on Western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual, existing water competition. Western produce, such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia and Baltimore over continuous water routes via the lakes and canal or over combined rail and water routes.

"The all-rail lines, seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water route or by the combined rail and water routes. The all-rail routes make their rates as much higher as the difference in the service will permit, and those rates are correspondingly adjusted from all Western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rate from Chicago to Charleston on hay, for instance, is 33 c. per 100 lbs.; from St. Louis, 28 c.; from Louisville, Evansville and Cairo, 23 c.; and from Memphis, 19 c. — the route through Memphis offering facilities for the transportation of hay, grain and Western products generally from the States of Missouri, Kansas, Nebraska, etc.

"The rate from Memphis to Charleston on hay is, therefore, forced upon the defendant lines by actual existing water competition and other competition beyond the control of defendant.

"The controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston."

On the foregoing issues testimony was taken before the Commission, which entered an order requiring the defendants to desist on or before a date named from charging any greater sum in the aggregate for the transportation from Memphis to Summerville of hay, or other commodities carried by them,

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under circumstances and conditions similar to those appearing in the case, than was being charged for such transportation for the longer distance to Charleston. This order, however, stated that it was made without prejudice to the right of the defendants to apply to the Commission for relief under the fourth section of the Act to regulate Commerce. The order not having been obeyed, Behlmer, as authorized by section 5 of the act of March 2, 1889, c. 382, 25 Stat. 855, 859, amending section 16 of the original act, filed his complaint in the Circuit Court of the United States for the Fourth Circuit, Eastern District of South Carolina, against the defendants in the proceedings before the Commission and the purchasers, assignees and successors of some of them, praying that the court might enforce compliance with the order of the Commission. By stipulation the testimony taken before the Commission was used at the hearing in the Circuit Court, and by consent certain documentary evidence (consisting of railway agreements, tariffs, reports, etc.) was filed as additional evidence on behalf of the defendants.

The case was heard by the Circuit Court, and, on January 22, 1896, the bill was ordered to be dismissed. 71 Fed. Rep. 835. The controversy was then taken by appeal to the Circuit Court of Appeals for the Fourth Circuit, and that court reversed the judgment of the Circuit Court, and remanded the cause with instructions to render a decree substantially in accordance with the order made by the Commission. 42 U. S. App. 581. A motion for a rehearing having been denied, the case was then brought to this court.

Mr. Edward Baxter for appellants.

Mr. Claudian B. Northrop for appellee.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

The questions which arise on this record involve the consideration of several provisions of the act of February 4, 1887, c. 104, to regulate Commerce. 24 Stat. 379.

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The particular questions at issue and the aspect in which they arise will be best shown by first considering the action of the Commission, then that of the Circuit Court in reviewing the order of that body, and, thirdly, that of the Circuit Court of Appeals in reversing the decree of the Circuit Court. The Commission held, as a matter of fact, that the carriers so conducted their business as to constitute a through line within the meaning of the Commerce Act, and were therefore amenable to its provisions. It did not, however, consider whether the rates to Summerville and Charleston were just and reasonable, because it deemed it unnecessary to do so. The reason for this conclusion was stated as follows:

"If it shall appear in this case that the defendants violate the long and short haul clause of the law by keeping the higher rate to Summerville in force, it will be unnecessary to consider in this report whether the rate to Summerville is in violation of other provisions of the law. In that event the prohibition of the fourth section will afford all the reduction demanded in the complaint."

When it approached the fourth section of the act, the Commission declined to weigh the evidence before it as to the existence of competition, except in so far as to enable it to determine that the evidence established that the competition relied upon by the carriers did not originate at the point of shipment, or if it did arise at such place it was alone engendered by the presence there of other carriers who were subject to the Commerce Law.

This determination of the Commission to restrict its examination of the evidence solely to the extent necessary to enable it to ascertain the source and inherent character and not the materiality and substantiality of the competition, and therefore to exclude wholly from view the latter considerations, was predicated on the conclusion that, as a matter of law, no competition, however great might be its influence on carriage and rate making, could be by the carrier taken into consideration, of his own motion, in determining whether a lesser sum would be charged for the longer than for the shorter haul, if such competition arose from the sources or was wholly of

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the character which it was found by the Commission the proof established the competition relied on to be. That is to say, the Commission concluded, as a matter of law, that it was unnecessary to weigh the facts for the purpose of determining the materiality and extent of the competition, because, however strongly the proof might demonstrate its potency upon traffic and rates, nevertheless it would be without efficacy to give rise to such substantial dissimilarity as would justify the carrier, of his own motion, to charge a lesser rate for the longer than for the shorter haul. Whilst this was held to be the law, at the same time it was decided that the character of competition, which from its very nature was decided to be inadequate to create such legal dissimilarity in the conditions as to justify the carrier, of his own motion, charging a lesser sum for the longer than that for the shorter haul, nevertheless might authorize the Commission to sanction the lesser charge if the facts were presented to the Commission and its previous sanction to making such charge was obtained. Therefore the right of the carrier to prefer to the Commission a request for authority to make the charge complained of, predicated upon the very grounds which were held insufficient to permit the carrier to do so, on his own motion, was fully reserved. The ruling was, then, this, that some kinds of competition, however material and substantial in their operation, were yet inadequate, for the purpose of creating dissimilarity in circumstance and condition, to justify the independent action of the carrier, although the identical conditions of competition might be sufficient to produce such dissimilarity as to justify the Commission, on application made to it for such purpose, to authorize the carrier to charge less for a longer than was exacted for a shorter distance. The Commission said in its report (4 Inters. Com. Rep. 520, 523):

“There is no showing in this proceeding of competition by lines not subject to the Act to regulate Commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be carried to Charleston by various rail and water, or part rail and part water, routes

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from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the Commission for relief under the proviso clause of that section, but for reasons stated in our decisions of the cases above cited they do not justify carriers in departing from the rule of the fourth section without such a relieving order. Water competition, to justify lower long-haul rates, must exist between the point of shipment and the longer distance point of destination. (*James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. R. Co.*, *supra*.) One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. (*Chattanooga Board of Trade v. East Tennessee, V. & G. R. Co.*, *supra*.) The competition of markets, or the competition of carrying lines, subject to regulation under the Act to regulate Commerce does not justify carriers in making greater short-haul or lower long-haul charges over the same line without an order issued by the Commission on application therefor and after investigation. (*Ga. R. R. Com. v. Clyde S. S. Co.*, 4 Inters. Com. Rep. 120; 5 I. C. C. Rep. 324; and *Gerke Brew. Co. v. Louisville & N. R. Co.*, 4 Inters. Com. Rep. 267; 5 I. C. C. Rep. 596.)”

The Circuit Court held that one of the defendants had not been served with process so as to cause any decree which might be rendered to be conclusive, and, moreover, decided that the proof did not establish that the carriers, in the matter complained of, were under a common control and management for continuous shipment, within the meaning of the act, and, therefore, they were not, as to such carriage, amenable to the provisions of the act. The court, however, proceeded as follows (71 Fed. Rep. 839):

“But if we assume, for the sake of argument, that all the defendants are affected by this charge, does it violate the fourth section of the act above quoted? Judge Cooley, in *In re L. & N. R. R. Co.*, 1 Inters. Com. Rep. 57, says: ‘The charg-

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ing or receiving greater compensation for the shorter than for the longer haul is sure [seen] to be forbidden only where both are under substantially the same circumstances and conditions. And, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated.' This is quoted with approbation by the United States Circuit Court, Southern District California. (*Interstate Commerce Commission v. A. T. & S. F. R. Co.*, 50 Fed. Rep. 295.)

"When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley, in the same case, answers this question: 'Among other things in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition were to continue. And water competition was, beyond doubt, especially in view.'

"In the case from 50 Fed. Rep. above cited, this is one of the rubrics: 'Los Angeles, California, is a point to which there is active competition in certain kinds of freight between several transcontinental railway lines, direct or by water, via Vancouver and San Francisco; also, by ocean freights, via Aspinwall and the Straits of Magellan, from points east of the Missouri River. And a through rate on the same kind of freight, lower than to San Bernardino, an intermediate non-competitive point, 60 miles from Los Angeles, on one of the competing railroad lines, is not prohibited by the act, since the circumstances and conditions were substantially dissimilar.'

"The circumstances of the case at bar are closely like those of the case just quoted. Charleston is a competitive point between all-railroad routes, routes partly by rail and partly by water, and routes all water. If the defendants had not consented with each other to lower the rate, no hay whatever would come from the hay-producing territory tributary to Memphis; and all the southeast Atlantic States would be compelled to rely on other portions of the West, North or Northeast for hay.

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"The evidence clearly shows that the rate to Charleston was forced down by this competition. But this is an advantage to all the territory tributary to Charleston, and all stations share in it. No such competition exists at Summerville, a small inland town. If it, and others like it, were permitted to share in the circumstances and conditions surrounding Charleston and to get the benefit of the competition which Charleston enjoys, and they have not, then, *ex necessitate*, the South Carolina Railway will be called upon to elect between its through business and its local business, and in this election to give up the former. Thus, all stations on the line of road will pay local freight on hay, and the market, to the extent of imports from Memphis, will be destroyed. The interstate commerce law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade."

Subsequently the attention of the Circuit Court was called to the asserted fact that there had been a service on the defendant, as to whom it was stated, in the opinion of the court, there had been no service of process. In a memorandum opinion the court in substance said that, conceding *arguendo* the correctness of the fact called to its attention, as it would not change the result of the decision, it was unnecessary to further consider it.

The Circuit Court of Appeals decided that the Circuit Court had mistakenly held that one of the parties essential to the cause had not been properly served, and that the Circuit Court had also fallen into error in deciding that the carriers in question were not, within the intendment of the Commerce Act, a continuous line for through transportation under a common management and control. When it came to consider the conflicting conclusions of the Commission and the Circuit Court as to the meaning of the fourth section of the act, the court held that the interpretation adopted by the Commission was right, and that upheld by the Circuit Court was wrong. In other words, the Circuit Court of Appeals decided that no competition existing at the place of delivery, however far reaching, or arising at the initial point from the action of other

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carriers who were subject to the control of the act, could justify a carrier in making a greater charge for a shorter than for a longer haul, although such competitive conditions might empower the Commission, on application of the carrier to grant the right to make such charge. The reasons which impelled the Circuit Court of Appeals to the conclusion by it reached are very clearly stated in its opinion, from which a member of the court (Morris, District Judge) dissented. The court said (42 U. S. App. 594):

"The decisions of the Interstate Commerce Commission, concerning the proper construction of section 4 of the Interstate Commerce Act, have not been uniformly sustained by the decrees of the courts of the United States in cases instituted for the purpose of enforcing the orders of the Commission concerning that section, and, therefore, prior to the announcement of the opinion of the Supreme Court in the *Social Circle case* there was much confusion concerning the true meaning of the same. A careful reading of that opinion impels us to the conclusion that the construction given that section by the Interstate Commerce Commission, in a number of cases decided by it prior to such decision, is the proper one. In this connection may be cited the following: *The James & Mayer Buggy Co. v. The Cin., N. O. & Tex. Pac. R. Co.*, 3 Inters. Com. Rep. 682; *Trammel v. Clyde S. S. Co.*, 4 Inters. Com. Rep. 120; *The Board of Trade of Chattanooga v. East Tenn., V. & G. R. Co.*, 4 Inters. Com. Rep. 213."

Again:

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission (4 Inters. Com. Rep. 520), which is, in substance, that in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic

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from any particular locality, unless one line could perform the service if the other did not. Such, we believe, to be the true meaning of section 4, so far as the point we are now considering is involved. We are also of opinion that the competition claimed by the appellees to exist between the different markets—particularly those of Memphis, Chicago and the North Atlantic ports—to supply the trade of Charleston in the products mentioned, is not in reality the competition that affects rates from a particular locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character and not connected with the usual conditions under which transportation is conducted, nor does such competition in our judgment create the dissimilar circumstances and conditions referred to in the fourth section of the act now under consideration. And we further hold that competition between carriers subject to the requirements of said act does not produce such substantial dissimilarity in the circumstances and conditions under which transportation is performed as will justify such carriers in making a greater charge for the shorter than for the longer haul, without an order to that effect from the Commission, granted by it as provided for in the proviso to the fourth section."

Approaching, then, a solution of the questions which arise from the report of the Commission and the decisions below rendered, which substantially also embrace the essential matters covered by the assignments of error and the material issues which were urged in the argument at bar, it appears that the propositions involved are threefold. First. Was it correctly decided that the carriers as the result of the arrangements between them constituted, within the purview of the first section of the Act to regulate Commerce, a continuous line, so far at least as regards the shipments between Memphis, Summerville and Charleston? Second. Was it correctly held by the Commission and decided by the Circuit Court of Appeals, that under the fourth section of the act no competition, however material, unless it arose from certain enumerated sources or was of the inherent character stated by the

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Commission and the Circuit Court of Appeals, could create such dissimilarity of circumstance and condition as would authorize the carrier, of his own motion, to charge a greater rate for a lesser than for a longer distance? The provisions of the fourth section which are involved in the second proposition are as follows:

"SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: provided, however, that upon application to the Commission appointed under the provisions of this act such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

Third. If it be concluded that the Commission and the Circuit Court of Appeals erroneously interpreted the fourth section of the act, is the record in such a condition as to justify this court in deciding, as a question of first impression, whether the through rates, complained of, were just and reasonable, and whether, if yes, the proof offered by the carrier established such substantial and material competition, as would support a charge by the carrier, on his own motion, of a lesser rate for the longer than is exacted for the shorter distance?

The first two of the foregoing questions in effect solely involve propositions of law, for, although the essential predicate upon which they rest takes into consideration certain facts, they were not disputed below, and their existence was

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not denied in the argument at bar. They may be assumed, therefore, as being unchallenged for the purpose of the legal questions presented. We come, then, to the immediate consideration of the propositions above referred to in the order stated.

1st. The conceded facts from which it was deduced as a matter of law that the carriers were operating "under a common control, management or arrangement for a continuous carriage or shipment" were as follows: The several carriers transported hay from Memphis under through bills of lading, by continuous carriage, to Summerville and Charleston. The several roads shared in an agreed rate on traffic to Charleston and in a precisely equal in amount rate on traffic to Summerville. On shipments to Summerville, however, there was added to the Charleston rate the amount of the local rate from Charleston to Summerville, the benefit of which additional exaction was solely received by the local road on which Summerville was situated. The contention that under this state of facts the carriers did not constitute a continuous line, bringing them within the control of the Act to regulate Commerce, is no longer open to controversy in this court. In *Cin., N. O. & Texas Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 184, decided since the case in hand was before the Commission and the Circuit Court, it was held under a state of facts substantially similar to that here found that the carriers were thereby subject to the Act to regulate Commerce.

2d. It is, as we have said, uncontroverted that all the competition relied on by the carriers, to establish that there was a dissimilarity of circumstance and condition, arose solely from two sources; either that originating at Memphis, the initial point of the traffic, from the presence there of carriers who were subject to the provisions of the Commerce Act, or competition based on the fact that Charleston was connected with or accessible to lines of rail and water communication which brought it in relation with many other places and markets other than Memphis, thereby creating competition between Memphis and Charleston, the claim being that Memphis would have been deprived of the benefits of the Charleston traffic, and Charles-

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ton would be also cut off from the Memphis supply if the rates from Memphis to Charleston had not been made lower to meet the competition at Charleston.

The construction of the fourth section of the Act to regulate Commerce and the question whether competition which materially operated on traffic and rates was a proper subject to be considered by a carrier in charging a greater rate for the shorter than was asked for the longer distance, on account of the dissimilarity of circumstance and condition produced by such competition, has recently, after elaborate argument and great consideration, been passed upon by this court. In *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, the facts as stated by the court which are pertinent to the legal question now under consideration were briefly as follows (pp. 197-200): "The Interstate Commerce Commission entered an order directing the railway to forthwith cease and desist from carrying any article of imported traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading destined to any place within the United States, at any other than upon the inland tariff covering other freight from such port of entry to such place of destination, or at any other than the same rates established in such inland tariff for the carriage of other like kind of freight, in the elements of bulk, weight, value and expense of carriage. . . ." The railway company refused to obey the order, and a proceeding was initiated by complaint filed in the Circuit Court to compel it to do so. The substance of the answer of the railroad, so far as material to the matter now under review, was thus recited by the court (pp. 205-6):

"The answer of the Texas and Pacific Railway Company to the petition of the New York Board of Trade and Transportation before the Interstate Commerce Commission, and the answer of said company to the petition of the Commission filed in the Circuit Court, allege that rates for the transportation of commodities from Liverpool and London, England, to San Francisco, California, are in effect fixed and controlled by the competition of sailing vessels for the entire distance;

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by steamships and sailing vessels in connection with railroads across the Isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting there under through arrangements with the Southern Pacific Railway Company to San Francisco: That, unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company: That the rates charged by it are not to the prejudice or disadvantage of New Orleans, and work no injury to that community, because, if said company is prevented from participating in said traffic, such traffic would move via the other routes and lines aforesaid without benefit to New Orleans, but, on the contrary, to its disadvantage: That the foreign or import traffic is upon orders by persons, firms and corporations in San Francisco and vicinity buying direct of first hands in London, Liverpool and other European markets; and if the order of the Commission should be carried into effect it would not result in discontinuance of that practice or in inducing them to buy in New Orleans in any event: That the result of the order would be to injuriously affect the defendant company in the carriage of articles of foreign imports to Memphis, St. Louis, Kansas City and other Missouri River points. . . ."

After stating that the foregoing facts were fully established by the proof and in effect conceded, and after remarking (p. 207) that they "would seem to constitute 'circumstances and conditions' worthy of consideration, when carriers are charged with being guilty of unjust discrimination or of giving unreasonable and undue preference or advantage to any person or locality," the court observed (p. 217):

"The Commission justified its action wholly upon the construction put by it on the Act to regulate Commerce, as forbidding the Commission to consider the 'circumstances and conditions' attendant upon the foreign traffic as such 'circum-

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stances and conditions' as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of 'unjust discrimination,' within the meaning of the act.

"In so construing the act we think the Commission erred."

Later, in recurring to the subject of competition as creating dissimilarity of circumstance and condition, the court said (p. 233):

"That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

In *Interstate Commerce Commission v. Alabama Midland Railway*, 168 U. S. 144, the controversy was this: A proceeding was commenced to compel a carrier to obey an order of the Commission forbidding the charge of a lesser rate for transportation to Montgomery, the longer distance, than was charged to Troy on the same line, the shorter distance. The nature of the competition relied on by the carriers is fully shown by a statement in the opinion, referring to one of the assignments of error made in the cause. The court said (Ib. p. 162):

"Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the Commission, wherein it was found and decided, among other things, that the defendants, common carriers which participate in the transportation of class goods to Troy

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from Louisville, St. Louis and Cincinnati, and from New York, Baltimore and other Northeastern points, and the defendants, common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendants, common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point or Norfolk, as local shipments or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus and other places and localities and dealers and shippers therein, in violation of the provisions of the Act to regulate Commerce."

It will thus be observed that the facts presented were, in legal effect, the equivalent of those arising on this record. The competition which the carrier asserted had created such dissimilarity of circumstance and condition as justified, on its own motion, the lesser charge for the longer than was made for the shorter distance, was competition not only arising by water transportation, but alleged to spring from common carriers who were confessedly subject to the control of the Act to regulate Commerce. The error which it was asserted the record contained was that such competition had been held, by the lower courts, sufficient to create dissimilar circumstances and conditions, and that the right of the carrier to avail himself of such dissimilarity without the previous assent of the Commission had been also sustained. This court said (pp. 162-3):

"Whether competition between lines of transportation to Montgomery, Eufaula and Columbus justifies the giving of those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission under the proviso of the fourth section

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of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case."

Proceeding to the question of law, the construction of the fourth section, which was involved in supporting the interpretation of the Commission, it was stated, as follows: "It is contended in the brief filed on behalf of the Interstate Commerce Commission that the existence of rival lines of transportation, and consequently, of competition for the traffic, are not facts to be considered . . . when determining whether property transported over the same line is carried, 'under substantially similar circumstances and conditions' as that phrase is found in the fourth section of the act." The court then examined this question, and after citing from an opinion of Judge Cooley in the matter of *In re Louisville & Nashville Railroad*, 1 Int. C. C. Rep. 31, 78, said (p. 164):

"That competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to regulate Commerce, has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: *Ex parte Koehler*, 31 Fed. Rep. 315; *Missouri Pacific Railway v. Texas & Pacific Railway*, 31 Fed. Rep. 862; *Interstate Commerce Commission v. Atchison, Topeka &c. Railroad*, 50 Fed. Rep. 295; *Same v. New Orleans & Texas Pacific Railroad*, 56 Fed. Rep. 925, 943; *Behlmer v. Louisville & Nashville Railroad*, 71 Fed. Rep. 835; *Interstate Commerce Commission v. Louisville & Nashville Railroad*, 73 Fed. Rep. 409."

It is to be remarked that among the cases approvingly cited in the passage just quoted will be found the opinion of the Circuit Court in the very case now before us, which opinion was opposed to the construction of the law taken by the Commission and to that announced by the Circuit Court of Appeals in this cause. Referring to the claim that under a correct interpretation of the proviso of the fourth section carriers were not allowed to avail themselves of dissimilar

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circumstances and conditions, arising from competition, without the previous assent of the Commission, the court again cited from an opinion of the Interstate Commerce Commission delivered by Judge Cooley, as follows (pp. 168-169):

"That which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid the carrier is left at liberty to do, without permission of any one. . . . The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. . . . Beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier, whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions."

And the approval of the construction given to the act in the passage from the opinion of Judge Cooley was not left to implication, since the court added (p. 169):

"The view thus expressed has been adopted in several of the Circuit Courts, (*Interstate Commerce Commission v. Atchison, Topeka &c. Railroad*, 50 Fed. Rep. 295, 300; *Same v. Cincinnati, N. O. & Tex. Pac. Railway*, 56 Fed. Rep. 925, 943; *Behlmer v. Louisville & Nashville Railroad*, 71 Fed.

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Rep. 835, 839;) and we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do."

It is then settled that the construction given in this cause by the Interstate Commerce Commission and the Circuit Court of Appeals to the fourth section of the Act to regulate Commerce was erroneous, and hence that both the Interstate Commerce Commission and the Circuit Court of Appeals mistakenly considered, as a matter of law, that competition, however material, arising from carriers who were subject to the Act to regulate Commerce could not be taken into consideration, and likewise that all competition, however substantial, not originating at the initial point of the traffic, was equally, as a matter of law, excluded from view. It follows that the decree of the Circuit Court must be reversed unless it be the duty of this court to examine the evidence, which was not passed on by the Commission or the Circuit Court of Appeals, for the purpose of ascertaining whether the competition relied on was so substantial and so controlling on traffic and rates as to cause it to produce a dissimilarity of circumstance and condition within the meaning of the fourth section of the act. A consideration of this subject leads to a solution of the third question which we have previously stated was involved in the cause. In passing, however, it is well to say that both the opinions of this court, just referred to, were announced subsequently to the decision in this case by the Interstate Commerce Commission and by the Circuit Court, and moreover that the opinion of this court in the last cause (the *Midland case*) was announced after the decision of the Circuit Court of Appeals of the case now here. Indeed, since the decision last referred to, it is not denied that the Interstate Commerce Commission have recognized that the interpretation previously given by it to the fourth section had been decided to be unsound, hence in the practical application of the law, since

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the decision by this court in the *Midland case*, the construction of the statute which was announced by the Commission in previous cases as well as in this has no longer been applied. 11 Ann. Rep. I. C. C. (1897), pp. 38, 43, 91; 7 I. C. C. Rep., pp. 456, 479, 480; *Savannah Bureau of Freight & Transportation v. Charleston & Savannah Ry. Co. et al.*

Before determining the final question we notice certain contentions pressed in argument, whereby it is asserted that there is such a difference between the legal issues here arising and those which were presented in the cases referred to, that this case should not be controlled by them. In any event, it is argued, the action of the Commission and the Circuit Court of Appeals in this controversy was of such a nature as to render the previous rulings of this court inapposite, and hence it is unnecessary to apply them. Whilst it is not denied as regards competition arising from other carriers at the place of origin of the traffic, who were subject to the control of the Act to regulate Commerce, that the decision here under review is not in accord with the rulings of this court, such it is claimed is not the case as to competition not originating at the initial point of carriage. From this premise it is argued that it was correctly decided below that substantial and material competition resulting from conditions existing at the point of delivery, such as accessibility of that place to other lines of transportation from other places by rail or water, or both, was, as a matter of law, correctly decided below to be without legal efficacy in producing dissimilarity of circumstances and conditions. In this regard, then, the decree below, it is insisted, was correct. But the facts which were presented in the records passed on by this court, in the cases to which we have referred, do not justify the premise from which this presumed difference is deduced. We do not stop, however, to analyze those facts, because, granting, *arguendo*, the assumption upon which the suggested distinction is based, we think it is without merit. What was decided in the previous cases was that under the fourth section of the act substantial competition which materially affected transportation and rates might under the statute be competent to produce dissimilarity

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of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate making, was proper under the statute to be taken into consideration. Indeed, if the distinction contended for were sound it would follow that the greater and more material competition would be without weight in determining whether a dissimilarity of circumstances and conditions existed, whilst the lesser competition would be potential for such purpose. Not only this, but if the distinction be applicable, only that competition which might deflect at the point of origin, the traffic from one carrier to another would be within the purview of that portion of the fourth section now under consideration, and competition which was so great as to absolutely prevent the movement of the traffic, unless the lesser rate was exacted, would be outside of its operation. This would lead to the construction that the statute, in empowering a carrier, under certain competitive conditions, of his own volition, to exact a lesser rate for the longer haul, contemplated only the interest of some particular carrier and not at all the public interest. Whilst the unsoundness of the proposition is thus shown, from the contradiction which inheres in it, the erroneous conception upon which it rests is fully demonstrated in the following excerpt from the opinion in *Texas & Pacific Railway v. Interstate Commerce Commission*, *supra*, 211:

"So, too, it could not readily be supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation."

Indeed, in the cases by which the controversy here before

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us is controlled, attention was pointedly called to the fact that in considering the power of the carrier, of his own motion, to charge a lesser sum for the longer haul, not only was the interest of the carrier to be taken into account, but also the interest of the public, especially at the place from which the traffic moved and the place to which it was to be delivered, and to these principles we shall before concluding again advert.

The argument upon which it is claimed that even if the legal principles here involved are not to be distinguished from those established by the decisions of this court, nevertheless the decree of the Circuit Court of Appeals should be affirmed, is as follows :

The Commission and the Circuit Court of Appeals, it is asserted, although they may have expressed erroneous opinions as to the construction of the statute, yet, ultimately, in substance, decided, as a matter of fact, that the competition was not of sufficient weight to bring about dissimilarity of circumstances and conditions. But this suggestion is without merit. We have shown, in our previous analysis of the action of the Commission and of the views expressed by the Circuit Court of Appeals, that whilst the facts were considered in so far as was necessary to determine that the competition was due only to certain particular causes, the result of the competition was not examined in order to ascertain the substantial materiality of its operation on traffic and rates. And this, because both the Commission and the Circuit Court of Appeals determined that competition of the particular character which they found that relied on to be, as a matter of law, however weighty in its operation on rates, was not legally entitled to be considered in reviewing the action of the carrier.

This failure to consider the evidence points to the distinction between this cause and that of *Cin., N. O. & Texas Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 184, upon which reliance is placed. In that case the court, from an examination of the whole record, considered that the result of the action of the Commission and the Circuit Court of Appeals had been substantially to decide not that the character of competition relied on could not be taken

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into view, but that fully weighing and considering it, sufficient proof did not result to show that it was so substantial and so material as to justify deciding that there were dissimilar circumstances and conditions. The judgment below was, because of this view as to such question, affirmed. The court said (p. 194): "But the question was one of fact, peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion." If it be again, *arguendo*, conceded that the state of the record in that case was such that an analysis of the action taken below might have well led the court to a different opinion; in other words, might have justified it in holding that both the Commission and the Circuit Court of Appeals had rested their conclusions, not on the want of proof as to the claimed competition, but solely on the absence of legal power to assert competition of the character relied on, such concession could have no influence upon the decision of this cause. This follows because the only deduction possible from the proposition would be that the particular case had been decided on a question of fact, when it should have been controlled by a question of law, which would afford no reason for the failure to apply sound principles of law to the facts of this record. It involves a complete *non sequitur* to assert that because legal principles may not have been applied to a given case, on the assumption that the facts did not render their application necessary, therefore, in future cases, where it was found that the facts brought the controversy within the principles, they should not be applied.

It remains only to examine the last question—that is, whether this court, as a matter of first impression, should weigh the evidence for the purpose of ascertaining whether it established such substantial and material competition as justified the carrier in concluding that dissimilarity of circumstance and condition was brought about. If it were true, as asserted in the argument for the appellee, that where the inherent character of the competition was of a nature to be taken into consideration, any competition, however remote

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and unsubstantial its influence on rates and traffic, would be sufficient to bring about dissimilarity of circumstances and conditions, the question would be easy of solution, for then to weigh the testimony would involve no serious duty. But this suggestion rests on an entire misconception of the adjudications of this court. In considering the right of a carrier to act on competitive conditions, deemed by him to produce dissimilarity of circumstances and conditions, the court, in *Interstate Commerce Commission v. Alabama & Midland Railway*, 168 U. S. 173, said :

"But it does not mean that the action of the carriers, in fixing and adjusting the rates in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences."

Again (p. 167) it was said :

"In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may

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in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second. That the competition relied upon be, not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered. If, then, we were to undertake the duty of weighing the evidence, in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the Commission, and were not weighed by the Circuit Court of Appeals, because both the Commission and the court erroneously construed the statute. But the law attributes *prima facie* effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising. In *Texas & Pacific Railway v. Interstate Commerce Commission*, (*ubi supra*), the court found the fact to be that the Commission had failed to consider and give weight to the proof in the record, affecting the question before it, on a mistaken view taken by it of the law, and that on review of the action of the Commission the Circuit Court of Appeals, whilst considering that the legal conclusion of the Commission was wrong, nevertheless proceeded as a matter of original investigation to weigh the testimony and determine the facts flowing from it. The court said (p. 238):

"If the Circuit Court of Appeals was of opinion that the Commission in making its order had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to reverse the decree, set aside the order, and remand the cause to the Commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its

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defence considered, in the first instance, at least, by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was."

We think these views should be applied in the case now under review. In this case, however, the proceeding to enforce the order of the Commission was initiated by a private individual on behalf of himself and other interested parties not named, and the petitioner in the Circuit Court has died since the argument and submission of the cause in this court. We are of opinion, therefore, that

The decree of the Circuit Court of Appeals should be reversed with costs, that the case be remanded to the Circuit Court with instructions to modify its decree adjudging that the order of the Commission be set aside with costs, by providing that the dismissal be without prejudice to the right of a party in interest to apply to the Commission to be substituted in the original proceeding before the Commission in the stead of the deceased petitioner, and that upon such substitution the Commission should proceed, upon the evidence already introduced before it or upon such evidence and any additional evidence which it might allow to be introduced, to hear and determine the matter of controversy in conformity to law. A decree will be entered accordingly, such entry to be made nunc pro tunc as of the date of the submission of the cause in this court.